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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD CANNISTRARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in light of *Dirks v. Securities and Exchange Commission, Chiarella v. United States* and *Carpenter v. United States,* Petitioner stands properly convicted of the crimes charged in the indictment?

2. Whether, in light of *Hill v. Lockhart,* counsel's conduct provided Petitioner with effective legal counsel upon which to decide to waive his rights and plead guilty?

3. Whether Petitioner's Rule 11 F.R. Cr. P. allocution violated this Court's decision in *United States v. McCarthy?*

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APPENDIX

Appendix A – Third Circuit Court of Appeals Decision Dated October 15, 1990 Affirming the District Court's Denial of Appellant's Motion to Withdraw His Guilty Plea 1a-4a

Appendix B – April 12, 1990 Decision of the District Court Denying Petitioner's Motion to Withdraw His Guilty Plea 1b-59b

No.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1990

RICHARD CANNISTRARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Richard Cannistraro prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in this matter is unreported. That opinion is reprinted in the appendix to this Petition at 1a -4a. An earlier opinion of the District Court upon which the Court of Appeals relied is reported at 734 F. Supp. 1110(D.N.J. 1990) and is reprinted in the Appendix to this matter at 1b- 59b. A previous attack upon the propriety of sentence given to petitioner originally was reported at 871 F. 2d 1210(3d Cir.1989).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1990. This Petition for a Writ of Certiorari is filed within ninety days of that judgment in compliance with rule 13. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). This District Court had subject matter jurisdiction pursuant to §18 U.S.C. 3231, the Third Circuit had jurisidiction under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition implicates the Due Process Clause of the Fifth Amendment to the United States Constitution as applies to Fed. R. Cr. Pr. Rule 11 in taking a guilty plea as well as the Sixth Amendment right to the effective assistance of counsel during all relevant parts of judicial proceedings.

STATEMENT OF THE CASE

A. Procedural History.

On May 28, 1987 Petitioner was charged in a nine count District of New Jersey indictment alleging a conspiracy to commit securities fraud, five counts of substantive securities

fraud in violation of Title 15 Section 78j(b), one count of interstate transportation of proceeds of securities fraud, one count of wire fraud, and one count of obstruction of justice.

On September 21, absent any motions having been filed on his behalf by counsel, Petitioner entered a guilty plea to each of the nine counts in the indictment. On November 2, 1987, Petitioner was sentenced to a total of eight years in prison, five years of probation, and was ordered to pay fines of $330,000 and restitution in the amount of $394,847 to a trustee appointed by the Securities and Exchange Commission. Petitioner subsequently appealed his sentence and by a decision reported at 871 F. 2d 1210(3d Cir. 1989) the conviction was affirmed in part but the sentence was vacated and remanded to the District Court for resentencing based upon a supplemented record.

Subsequent to the vacating of the sentence and prior to the District Court imposing a new sentence upon a supplemented record, Petitioner filed a motion to withdraw his guilty plea. The District Court held hearings on July 24, 1989, February 1, 1990 and February 8, 1990 on this motion. After hearing three days of testimony, including testimony from both of Petitioner's trial counsel, the Court rendered an opinion on April 12, 1990 denying the application. *United States v. Cannistraro,* 734 F. Supp. 1110(D.N.J. 1989) Petitioner was then sentenced by the District Court in conformity with the previous sentence imposed. A timely appeal was filed and by decision dated October 15, 1990, the Third Circuit Court of Appeals affirmed the District Court's denial of Petitioner's motion to withdraw his guilty plea in an unpublished opinion.

B. Statement of the Facts

At the allocution of Petitioner on September 21, 1987, he admitted that as to the conspiracy to commit securities fraud charge, he agreed with Bynum Vickory and Bill Fritz, each a manager of a mutual fund, for their respective funds to purchase positions in Liquidation Control, Inc. (LCI), a publicly traded company of which Petitioner was an officer and acknowledged stock owner, and in return for which, Petitioner would help gain an allocation of Toxic Waste Containment (TWC) stock on the initial offering to Vickory and Fritz or to nominees each designated. Petitioner admitted that it was his intention to benefit personally from this arrangement by having the LCI stock that he owned increase in value due to the increased demand for the stock.

Petitioner further stated that he had a partial beneficial interest in four nominee accounts which were set up at Monarch Funding. Two of those accounts, belonging to his aunt Mary Godano and his father, Edward Cannistraro, purchased stock in LCI at the initial public offering. The other two accounts were owned by Donna Lee Clarembeau and Carl Alan Key, friends of Petitioner. Each of these accounts purchased TWC stock. Petitioner admitted that he failed to disclose his partial beneficial interest in the LCI account positions of Godano and Cannistraro The LCI prospectus listed Petitioner as an officer in the company who held a substantial ownership position in the stock. This disclosure put anyone dealing with Petitioner on notice of his relationship to the company. There was no showing of any additional disclosure requirements than those fulfilled by Petitioner.

As to the Clarembeau and Key accounts, the owned stock was in TWC. Petitioner maintained during his allocution that those accounts sold their TWC stock prior to the issuance of his research report. Petitioner said at his allocution that "he did

not want his nominees to benefit from his research report, "therefore he had them sell their positions prior to the report being issued." Because there was no TWC stock held in any account at the time the research report was issued, from which Petitioner could profit, it was his determination that there was no requirement to disclose the existence of these liquidated positions in the report. Petitioner further maintained that his reports were honest and complete and that he had no intention to defraud the public by creating false projections co rning the company's future. Petitioner conceded that in the TWC market research report he did not disclose the arrangement with Vickory and Fritz, wherein their nominees could purchase stock on the initial offering of TWC in return for their committing their funds to purchase LCI stock on the open market.

Petitioner admitted that the sale of the LCI stock by Edward Cannistraro and Mary Godano resulted in a profit to those individuals in which he participated. On the TWC issue, Petitioner conceded that Bynum Vickory and William Fritz each earned a profit on the stock that they purchased and denied participating in the distribution of those profits.

At the time Petitioner allocuted, the Court did not have before it a copy of the indictment and conceded its inability to conduct the questioning of petitioner as to the factual basis of the plea. In face of this, Petitioner read a statement addressing each Count and then the Court asked counsel for the government to conduct additional questioning to satisfy himself of the sufficiency of the statement.

On July 24, 1989, February 1 and February 8, 1990, the District Court held hearings on petitioner's motion to withdraw his plea. The two chief witnesses at those hearings were Petitioner's trial counsel. They put forth a story for consumption by the District Court which defied belief. Despite

the nature of their testimony, the District Court credited them in each and every detail of their testimony and found incredible every other witness called to the stand by the government or by Petitioner in any regard in which they disagreed with trial counsel. Trial counsel's testimony revealed that their strategy of a smokescreen defense, that of trying to have the jury avoid the issues of the case and have them rather focus on the viability of the company was never pursued with any great vigor. The other question that emerges from the presentation of this proposed defense is whether or not it is in fact a defense for any counsel to pursue. Counsel further gave implausible explanations as to why they had failed to move for a Bill of Particulars, conduct conflict free investigation of the facts or file an appropriate motion to dismiss the obstruction of justice count on improper venue grounds. Each of the failures prejudiced Petitioner and undercut the voluntariness of his plea as to to render it a nullity.

REASONS FOR GRANTING THE WRIT

PETITIONER STANDS CONVICTED BASED ON AN ALLOCUTION WHICH DID NOT ADMIT FACTS THAT SUBSTANTIATE A FINDING OF GUILT BY THE DISTRICT COURT.

Dirks v. Securities and Exchange Commission, 463 U.S. 646, 653, 77 L. Ed. 2d 911, 103 S. Ct. 3255, (1983), reaffirmed the elements necessary to set forth a rule 10b-5 violation, "[i]n *Chiarella*, we accepted the two elements set out in *Cady*, Roberts for establishing a Rule 10b-5 violation:

> (i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of

> allowing a corporate insider to take advantage of that information by trading without disclosure.

The Court went on to note that

> not all breaches of fiduciary duty in connection with a securities transaction, however, come within the ambit of Rule 10b-5. *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 472, 51 Law Ed. 2d 480, 97 S. Ct. 1292(1977).

The Court summarily set forth the standard when it said

> Thus, an insider will be liable under Rule 10b-5 for insider trading only where he fails to disclose material non public information before trading on it and thus makes "secret profits." *Cady, Roberts, supra* at 916, n 31.

At no time during his plea allocution did Petioner admit to trading on material corporate inside information. Petitioner admitted at his allocution that he failed to disclose in the prospectus as an officer of LCI his partial beneficial interest in the stock owned by Mary Godano and Edward Cannistraro. The prospectus did, however, list Petitioner as an officer of LCI and set forth a substantial stock position held in his name.

The sale of LCI stock to market order by Mary Godano and Edward Cannistraro did not involve material non public information which Petitioner was obligated to disclose before the stock could be sold. The commitment of the fund managers to have their funds purchase LCI stock in the open market and the commitment to allow them, or their designated nominees, to purchase TWC at the market price, likewise did not involve a failure to disclose material non-public information.

Concerning the Clarembeau and Cannistraro accounts, the Petitioner allocuted to having arranged for the purchase of TWC stock by those accounts. Petitioner further allocuted that he wrote a report recommending the purchase of this stock for Wood Gundy, his employer, which was published by *Ground Floor Financial Publication.* Concerning these counts, the District Court in its opinion held

> as an allegedly disinterested stock analyst, Cannistraro had a duty to disclose his interest in TWC to Wood Gundy investors. His interest in TWC or participation in a bribery scheme would be material to a potential investor who purchased the stock in reliance on Cannistraro's advice.

The problem with this analysis is twofold. First, at the time Clarembeau and Key sold their stock, the research report recommending the purchase of the stock had not yet been distributed. Petitioner was very clear in his allocution that he did not want his nominees to benefit from the research report he was issuing. Therefore each of those individuals sold their position prior to the issuance of the report. Thus there was no intent to take advantage of the contents of the research report. Secondly, as a footnote in the report, the reader was put on notice that Wood Gundy and its officers may or may not be owners of stock in the company. Notice was thereby given to the reader of Petitioner's potential interest in the stock. He further allocuted that his research report was accurate as to the facts and figures concerning the company and to the prospects he saw for the future of the company.

During his allocution, Petitioner denied that the Mary Godano and the Edward Cannistraro accounts were used to manipulate the market or defraud investors. He further stated that any partial ownership he had in the accounts occurred after

his father's unexpected death. When the LCI prospectus was distributed to the investing public, Petitioner did not have any interest in those accounts to disclose. No reporting requirement for contingent ownership is necessary where it is uncertain when the future event vesting ownership will occur. *Transcon Lines v. A.G. Becker, Inc.* 470 F. Supp. 356, 370-3 71, (SDNY 1979). It is clear from the allocution that petitioner had no intention to defraud the public or manipulate the stock in an unwarranted fashion. Nor did he in any way attempt to trade on the stock based on information which was not yet public. Under the applicable standard enunciated by this Court, he admitted to no violation of the charged Statutes.

A. Failure to disclose beneficial ownership did not violate the securities laws.

In its opinion denying the plea withdrawal, the District Court bases conviction to the securities fraud on Petitioner's failure to disclose the ownership of the nominee accounts. In order for a disclosure omission, however, to violate 15 U.S.C. 78j(b) and Rule 10b-5, there must be (1) an affirmative duty to disclose; (2) a material omission and (3) the existence of scienter. All three elements must exist for the statute to be violated. Petitioner's conviction must be dismissed if any one of these critical elements are missing from the Rule 11 allocution. It is submitted that none of the three elements were present.

1. *There Was No Duty To Disclose.*

The landmark case on duty to disclose under 15 U.S.C. 78j(b) and Rule 106-5 is *Chiarella v. United States,* 445 U.S. 222, 63 L. Ed 2d 348(1980). Chiarella, an employee of a financial printer, deduced targets of takeover bids and traded in those companies' stock without disclosing. Chiarella's conviction was reversed by this Court which held that he had

no broad duty to disclose to all sellers in the market merely because he possessed material non-public information, there being no broad duty to disclose arising from 15 U.S.C. 78j(b).

> When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. We hold that a duty to disclose under §10(b) does not arise from mere possession of non-public market information. *Chiarella,* 445 U.S. at 235.

The holding in *Chiarella* applies to a research analyst such as Petitioner. In *Dirks,* supra, this Court reversed a judgment of securities fraud against a research analyst, Raymond Dirks, ruling that he did not violate the aniti-fraud provisions of federal securities laws, 15 U.S.C. 78j(b) and Rule 10b-5, since he had no pre-existing fiduciary duty to the sharelholders of a corporation whose stock he discussed with several of his clients. In that case, Dirks had negative inside information concerning Equity Funding and instead of disclosing publicly, Dirks selectively recommended to clients to sell the stock.

> Because the disclose-or-refrain duty is extraordinary, it attaches only when a party has legal obligations other than a mere duty to comply with the general antifraud proscriptions in the federal securities laws. *Dirks,* 463 U.S. at 657.

The District Court in its opinion, *United States v. Cannistraro,* 734 F. Supp. 1110 fails to consider that the Supreme Court in *Dirks,* specifically applied the *Chiarella* holdings to a research analyst such as Petitioner.

> the analysts's judgment in this respect is made available in market letters or otherwise to clients of the firm. It is the nature of this type of information and indeed of the markets themselves, that such

> information cannot be made simultaneously available to all of the corporation's stocholders or the public generally. *Id.*

This Court in *Dirks* further ruled that an analyst has no fiduciary duty to the shareholders of the company on which he makes investment recommendations. *Dirks* 463 at 659.

As a result of the *Chiarella* and *Dirks* decisions, no research analyst until Petitioner has been criminally convicted for trading in the stocks in which he makes investment recommendations. The only other criminal conviction of this kind involves a financial writer of the Wall Street Journal, R. Foster Winans, who schemed with friends and a stockbroker to purchase stocks in nominee accounts and to sell such stocks right after the Wall Street Journal column he authored was published, thereby profiting from the column's market impact. Winan's conduct far exceeded that admitted by Petitioner in that Winan's nominee accounts benefitted directly from his column, selling into its efects, whereas Petitioner sought to prevent his nominee accounts from benefitting by selling prior to his report's market impact.

Despite Winan's nominees direct benefit from his financial coluns, Winan's conviction was only upheld because of a misappropriation theory, finding that Winan's defrauded not the general public or the readers of the Wall Street Journal, but his employer, the Wall Street Journal, who had an official written conflict of interest policy expressly prohibiting its employees trading securities they wrote about in the paper. See, *United States v. Winans*, 612 F. Supp. 827 (S.D.N.Y. 1985), *United States v. Carpenter*, 791 F. 2d 1024 (2d Cir 1986); *Carpenter v. United States*, 98 L. Ed. 2d 275(1987). Absent the Journal's official confilict of interest policy, Winans could not be convicted of securities fraud. The Government withdrew the charge of securities fraud upon the readers of the Journal

because of the *Chiarella* decision, *United States v. Winans, supra*, at 840, and conceded that without any official policy by the Wall Street Journal, there could be no prosecution under the misappropriation theory. *Id* at 842. The District Court agreed that without the misappropriation theory, Winans could not be convicted of securities fraud, stating

> to find *Dirks* controlling would be to find no securities violation here, since Winans was not a temporary insider, did not owe any duty to the corporations he wrote about, and was not a tippee of any corporate inside information. In terms of securities laws, neither Winans nor the Wall Street Journal owed any duties at all to the corporations that were subject of Heard columns or to the shareholders of those corporations.
> *Winans*, 612 F. Supp at 841.

The Second Circuit conceded that Chiarella rejected a theory that merely using information not available or accessible to others gives rise to a violation of Rule 10b-5. See *United States v. Carpenter*, 791 F. 2d at 1031. It upheld Winans' conviction specifically on whether an employee's use of such information in breech of a duty of confidentiality to an employer serves as an absolute basis for a securities violation. *Id.* This Court upheld Winans' conviction for securities fraud based on defrauding the Wall Street Journal by an equally divided vote. *Carpenter v. United States*, 98 L. Ed 2d at 275.

In the instant case, Petitioner's employer, Wood Gundy, did not have an official policy that employees of Wood Gundy must refrain from trading in securities covered in its research reports. No evidence of such a policy was ever introduced at the plea hearing. To the contrary, evidence that no trading restriction existed was introduced to the District Court. The research report itself disclosed that officers of Wood Gundy

could hold shares of TWC. Petitioner cannot therefore be convicted under the misappropriation theory that was applied to Winans. Thus under *Chiarella, Dirks* and *Carpenter,* Petitioner had no duty to disclose the beneficial ownership of the nominee accounts even if the shartes of TWC were held by the nominee accounts at the time of the report's issuance. Petitioner certainly had no duty to disclose where the nominees had alrady sold all shares prior to the report being issued. Therefore, Petitioner's conviction for conspiracy to commit securities fraud and securities fraud must be dismissed as there was no duty to disclose.

2. *The Materiality Requirement For Disclosure Was Not Met.*

Had there been a duty to disclose, the information omitted must still be material in order for there to be a violation of 15 U.S.C. 78j(b) and Rule 10b-5. *Healy v. Catalyst Recovery of Pennsylvania Inc.* 616 F. 3d 641, 647 (3d Cir. 1980). No material inside information has ever been alleged or admitted. The conviction is based on the omission to disclose the beneficial owners of nominee accounts. The Williams Act, 15 U.S.C 78m(d), 78 n(d) clearly states the standard for materiality as needing the ownership to exceed 5% of the class of stock to require disclosure of beneficial aownership. The nominee accounts in the instant case acquired for less than 5% of the shares and the materiality requirement was not met. In *Corenco v. Schiavone and Sons,* 488 F. 2d 207, 217 (2d Cir 1973), a stockbroker's secret ownership of 4.99% of a company's shares through nominee accounts was not violative of the securities laws.

Moreover, Petitioner's research report never promoted TWC on the basis that M & I Fund or Calvin Bullock Fund might be buyers of TWC. Therefore the fact that fund managers had purchased TWC in nominee accounts was not a

material omission to the report. Purchases of stock by nominees were at the same offering price that the stock was purchased by the public. There were no special discounts requiring disclosure. Dollar amount of stock purchased by the fund managers nominees ($1,000 and $3,000) were minimal and immaterial to the investing public.

3. *No Scienter was Admitted.*

There can be no violation of 15 U.S.C. 78j(b) and Rule 10b-5 for conduct not involving scienter. *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 197-202(1976). Even had there been a duty to disclose, the failure to discuss scienter by the Court at the Rule 11 hearing and the failure of Petitioner to admit scienter invalidates the guilty plea.

> a "willfulness" instruction alone is not sufficient. The failure to instruct on all elements of fraudulent non-disclosure, including that the defendant possessed a mental state embracing an intent to deceive, manipulate or defraud, that is that the defendant knew he had a duty to disclose and intentionally failed to do so is in my opinion fatal to his conviction.
> *United States v. Chestman*, 903 F. 2d 75, 88(2d Cir. 1990).

One cannot be convicted for conspiracy to do an act which is not a crime. The lack of any of the three elements discussed above, duty to disclose, materiality and scienter requires a reversal of the securities fraud counts and the conspiracy to commit securities fraud count.

B. *United States v. Maxe* and *Parr v. United States* preclude conviction on mail fraud and interstate transportation of monies obtained by fraud.

These two counts of the Indictment were based on the securities fraud conspiracy conviction and depend on that conspiracy conviction for their viablity. If Count 1 is dismissed, Counts 7 and 8 must also be dismissed.

Additionally, Count 8, the mail fraud conviction, should be dismissed, regardless of the Court's determination of Count 1, because the only charged mailing had no purpose in the execution of any illegal scheme and could not possibly be in furtherance of any scheme to defraud. The charged mailing was a letter by the M& I Bank to the transfer agent to adjust its records from street name to a specific account name well after the stock had been purchased by the M & I Bank. Such a mailing was not in furtherance of a scheme or a step toward receipt of the fruits of a scheme.

In *United States v. Maze,* 414 U.S. 395 (1974), this Court held that the mailing of invoices by motels to a bank and mailings by the bank to credit card customers were not sufficiently related to a fraud scheme to violate the mail fraud statute since the scheme had reached fruition and the mails were used to adjust account records rather than for the purpose of executing the defendant's scheme. See also *United States v. Tarnopol,* 561 F. 2d 466 (3d Cir 1977); *Parr v. United States,* 363 U.S. 370 (1960). (Mail fraud statute does not purport to reach all frauds, but only those limited instances in which use of mails report of the execution of the fraud)

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PRIOR TO THE ENTRY OF HIS GUILTY PLEA.

Rule 32(d) F. R. Cr. P. as it applies to offenses committed prior to November 1, 1987, provides:

> If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended or disposition is had under 18 U.S.C. §4205(c), the Court may permit withdrawal of the plea upon a showing by defendant of any fair and just reason. At any later time a plea may be set aside only on direct appeal or by motion under 28 U.S.C.§2255.

Although expressing doubts as to the applicability of this standard, the District Court agreed to its application in determining Petitioner's motion in the first instance.

In ascertaining whether or not to grant a motion to withdraw based upon the ineffective assistance of counsel,

> the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'. *Hill v. Lockhart,* 474 U.S. 52, 56(1985).

Rule 32(d) does not require the implication of the second prong of the test enunciated in *Strickland v. Washington,* 466 U.S. 668(1984), that

> there is a reasonable probability that, but for counsel's unprofessional errors, the results of the

> proceeding would have been different. *Hill v. Lockhart,* at 57-58.

Rather, what the Rule requires is that if the Court, after reviewing counsel's conduct, believes that because of counsel's shortcomings, it would be "fair and just" to permit the withdrawal of the guilty plea, the motion should be granted. The underlying basis for the rule is the belief that a lay person receiving ineffective assistance of counsel, cannot make an informed and voluntary waiver of his constitutional rights before entering his plea.

A. The failure to file a motion for a Bill of Particulars denied Petitioner the opportunity to understand the full nature of the charges against him and make an informed decision concerning whether or not to voluntarily enter a guilty plea.

> "A Bill of Particulars is a proper procedure for discovering the names of unindicted co-conspirators who the Government plans to use as witnesses. It is not uncommon for the trial judge to require the Government to disclose their names when the information is necessary in a defendant's preparation for trial." See *Will v. United States,* 389 U.S. 90, 99, 88 S. Ct. 269, 19 L. Ed. 2d 304(1967).

When questioned at the post-conviction hearings on the motion to withdraw Petitioner's guilty plea, counsel asserted his reason for not filing a motion for a Bill of Particulars was, "such motions are routinely not granted in the Third Circuit" and "he has never found any meaningful information to be provided via the Government's answer to a Bill of Particulars." This testimony reveals a profound ignorance of the law. Contrary to counsel's testimony, such requests for

Bill of Particulars are routinely granted in the Third Circuit. See *United States v. Vastola,* 670 F. Supp. 1244, 1269-70(D.N.J., 1987); *United States v. Felton,* 592 F. Supp. 172, 197(W.D.Pa, 1984), rev'd on other grounds, 753 F. 2d 256, 276(3d Cir. 1985); *United States v. Holman,* 490 F. Supp. 755, 762(E.D.Pa., 1980); *United States v. Enger,* 472 F. Supp. 490, 510-11(D.N.J. 1978).

The Bill of Particulars is an invaluable information gathering device enabling a defendant to prepare his defense and plead a determination as a bar to subsequent prosecution. *Grady v. Corbin* , 495 U.S. , 110 S. Ct. 2084, 109 L. Ed. 2d 548(1990) From this beginning, counsel is able to conduct his own investigation to ascertain what the merits of his client's case are and whether or not to advise Petitioner to proceed to trial or to seek to terminate the litigation through some sort of a plea bargain. Absent taking the first step of filing appropriate motions, trial counsel denied themselves the ability to make an informed judgment of the relative options open to Petitioner concerning the course the litigation should take.

Additionally, in mail, wire and securities fraud cases, courts have generally granted Bills of Particulars that not only provide names of co-conspirators, places, dates and alleged victims but also provide additional information such as any mailings, telegrams, details of telephone calls, firms trading securities, brokers involved in the securities and names and details of any alleged foreign accounts involved. See *United States v. Crisona,* 271 F. Supp. 150, 156-57 (S.D. N.Y. 1967); *United States v. Pilnick,* 267 F. Supp. 791, 801 (S.D.N.Y. 1967); *United States v. Dioguardi,* 332 F. Supp. 7, 15 (S.D.N.Y. 1971), *United States v. Rosenstein,* 303 F. Supp. 210, 213 (S.D.N.Y. 1969). Such information would have been extremely beneficial in evaluating and preparing a defense and in determining whether to plead guilty. Failure of trial counsel to be aware of applicable Third Circuit decisions

regarding Bills of Particulars and their importance prejudiced Petitioner not only by limiting the available information needed to evaluate the government's case, conduct an investigation, prepare a defense and decide whether to try the case, but also by subjecting Petitioner to a second indictment without sufficient information to plead a conviction in this case as a bar to that prosecution.

B. The failure of trial counsel to make a motion to strike Count Nine, the Obstruction of Justice charge, for lack of proper venue, prejudiced the Petitioner.

By his own admission, trial counsel deemed Count Nine to be of mjaor importance. Counsel stated his belief that the obstruction of justice charge transformed a minor securities case with the possibility of probation as a sentence into a substantial case almost mandating a jail term. The crucial aspect of Count Nine is that all conduct between Petitioner and Carl Allen Key admittedly occurred outside the District of New Jersey. The only relation of the District of New Jersey to the conduct is the allegation that the Grand Jury conducting the investigation was sitting in the District of New Jersey.

At the time of Petitioner's plea, the Third Circuit had not decided this issue. The only case in the Third Circuit was *United States v. Bachert,* 449 F. Supp. 508 (E.D. Pa, 1978), which held that venue was improperly pled in the jurisdiction in a case in which the acts done to influence the proceedings in the Eastern District of Pennsylvania were conducted outside of that district. Following the analysis of *Bachert,* a motion for a dismissal of the charge based on improper venue would have been successful. If the motion were made and the District Court granted it, then count nine would have been removed from the indictment and counsel's determination that the matter would have been reduced back to a small securities case with

the likelihood of a probationary sentence would have been much stronger. Petitioner was entitled to know at the very least the nature of the issue that he was waiving by pleading guilty to the charge. This issue was never discussed by counsel with Petitioner, who was never able to make a determination as to whether or not he wished to waive the venue attack on the indictment.

C. Counsel failed to conduct a factual investigation prior to advising his client to enter a guilty plea.

As a general rule, an attorney must investigate a case in order to provide a minimally competent professional representation. *Crisp v. Duckworth,* 743 F. 2d 580, 583 (7th Cir. 1984). A failure to conduct a pre-trial factual investigation before determining what course of action to recommend to a client generally has been considered to constitute a clear instance of ineffective assistance of counsel. *United States v. Gray,* 878 F. 2d, 702, 711, (3d Cir. 1989). Here, counsel admitted he never tried to conduct a factual investigation to learn the underlying basis of the charge and ascertain whether or not he could structure a defense to those allegations. From the beginning, it was his intention to construct what he called "the smokescreen defense". This was a defense he described as being routinely used in white collar cases. Its intention was to avoid litigating the facts alleged in the indictment. Counsel's stated intention was to divert the jury's attention from the essential facts and considerations of the indictment and have them focus on extraneous matters, such as the viability of the company.

Counsel admittedly spoke to none of the officers of LCI or TWC concerning the viability of the company and the reasons for the companies' successes and failures. Such interviews were never attempted because of the "assumption" that

attorneys would advise corporate officers to claim their Fifth Amendment privilege. At the very least, a competent trial counsel has the duty to make an independent investigation of the facts and circumstances of the case. He must utilize every effort to persuade witnesses to cooperate with him in his gathering of facts, and if unsuccessful, to subpoena them. To assume what a person will do is a feeble explanation for abdication of professional responsibility. Such failure to properly investigate witnesses and evidence is ineffective assistance of counsel.

The hearings post-plea to withdraw said plea showed that there was a distinct factual dispute between two companies, TWC and Thatcher Engineering as to the nature of their negotiations and the scope of their agreements.

Counsel did speak with an attorney for Thatcher. This attorney advised that he did not believe that the Thatcher Engineering Company had the ability to enter into the contract with TWC. What counsel did not do was to try to interview the attorney for TWC, Gary Wolff, relating to his understanding of these negotiations by TWC. The testimony of Wolff at the post-plea hearings, support Petitioner's contention that Petitioner's research report was accurate and that he did nothing improper to manipulate the price of the stock. Petitioner was certainly entitled to know of the existence of such supporting testimony and documentation before making a decision as to whether or not to voluntarily waive his rights and plead guilty.

In a complex securities fraud case where large amounts of documents such as brokerage firm back office records, bank records and foreign account transactions, needed to be analyzed, the services of an accountant are vital. "We believe that it should have been obvious to a competent lawyer that the assistance of an accountant would be necessary." *United States*

v. Tucker, 716 F. 2d. 576, 581 (9th Cir. 1983). Counsel's conduct in this matter was ineffective, thereby rendering the advice given to Petitioner a nullity and making suspect the voluntariness of the decision to waive his right to trial and enter a guilty plea to all counts in the indictment.[1]

D. Petioner has the right to a conflict-free defense effort.

What minimal attempt counsel made at a pre-trial investigation was flawed by his use of an investigator with divided loyalties. Because no motion for a Bill of Particulars was filed, the known but unnamed co-conspirators were never identified on the record to Petitioner. Yet counsel admitted he worked with an investigator hired by a man whom counsel believed to be an unnamed but known co-conspirator. Thus the meager information received was suspect in its origin.

A suspected co-conspirator has an inbred conflict of interest. An investigator hired by a co-conspirator cannot be relied upon to provide counsel with all true information gathered, especially if such information is detrimental to the interests of the individual who hired him. It is obvious that the loyalties of this investigator run at best to both parties. It is also obvious that the man believed to be the unindicted co-conspirator has interests which are different and in large degree may be conflicting with those of Petitioner.[2]

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[1] Advice to plead guilty to a multi count indictment without any benefit of a plea bargain has been ruled to be ineffective assistance of counsel. See *Neal v. Wainright*, 512 F. Supp. 92, 97(S.D.Fl. 1981).

[2] The man counsel believed to be the co-conspirator was subsequently named in an indictment presently pending before the same judge in the

(*Footnote continued*)

Worse than conducting no investigation at all, counsel conducted a minimal investigation with the use of an investigator whose loyalties were not solely to his client, and therefore placed himself in a conflict of interest situation which negated his ability to render conflict free competent advice to his client.

THE FAILURE TO COMPLY WITH RULE 11 PROCEDURES RENDERED THE GUILTY PLEA INVOLUNTARY.

In *United States v. McCarthy,* 394 U.S. 459 (1969), this court held that a trial judge must conduct the questioning of Petitioner at the time of the entrance of his guilty plea personally. The underlying basis of this holding was to avoid the creation of an atmosphere of subtle coercion which takes place when a prosecutor asks the question of his adversary. The trial court abdicated this responsibility, noting that he did not even have a copy of the indictment in front of him from which to conduct the questioning of Petitioner. Rather, what was done was that a letter was submitted by the Government as to the questions they intended to ask, and during the allocution there was much dispute as to what questions were to be answered and the way they would be answered. The failure to comply with the Rule 11 requirement that the trial judge conduct the questioning personally mandates that the guilty plea be set aside.

The District Court in *Cannistraro,* supra at 1135, relies on *United States v. Timmreck,* 441 U.S. 780, for its denial of Petitioner's Rule 32(d) motion to withdraw the guilty plea based on these Rule 11 violations. In *Timmreck,* collateral

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District of New Jersey in which Petitioner is also named as his co-conspirator and co-indictee.

relief was denied where a court failed to inform a defendant of mandatory special parole. This Court held that habeas corpus relief under §2255 requires a showing of prejudice. In the instant case, however, not only does Petitioner have a lower burden than that of Timmreck since a Rule 32(d) motion only requires a "fair and just" reason for withdrawal of the plea but also substantial rights were violated by the Rule 11 procedures causing prejudice to Petitioner. Here Petitioner is challenging the validity of his plea based on the factual basis allocuted and his understanding of the nature of these very complex charges. His belief that his actions were not criminal under the statutes charged is an assertion of his innocence.

The uncontested Rule 11 violations such as the failure of the District Court to have a copy of the Indictment to refer to; the failure to have the Indictment read on the record; and the use of the prosecutor to conduct the required questioning of Petitioner concerning the basis of the plea substantially prejudiced Petitioner and resulted in an unknowing guilty plea. There was absolutely no discussion of the critical elements of securities fraud such as duty to disclose, materiality and scienter. As discussed in detail above, such failure to discuss these elements resulted in a plea which never admits these required elements.

For all of the above reasons, the Court should grant Certiorari and hold that Petitioner's guilty plea is a nullity because of the ineffective assistance of counsel and the failure to allocute to a crime as charged in the indictment.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL B. POLLACK
Counsel of Record
MICHAEL B. POLLACK, ESQ.
Attorney for Petitioner

Dated: January 14, 1991

APPENDIX A

APPENDIX A — THIRD CIRCUIT COURT OF APPEALS DECISION DATED OCTOBER 15, 1990 AFFIRMING THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-5344 and 90-5369

UNITED STATES OF AMERICA
v.
CANNISTRARO, RICHARD

Richard S. CANNISTRARO, Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 87-139)
District Judge: Honorable Alfred J. Lechner, Jr.

Submitted under Third Circuit Rule 12(6)
October 9, 1990

BEFORE: GREENBERG, HUTCHINSON, and COWEN,
Circuit Judges

(Filed: October 15, 1990)

Before GREENBERG, Circuit Judge.

Richard Cannistraro appeals to this court following his resentencing on remand pursuant to our opinion in *United States v. Cannistraro*, 871 F.2d 1210 (3d Cir. 1989). At the resentencing on April 23, 1990, after he unsuccessfully sought to have the judge recuse himself, he received the same

sentence as originally imposed. He appeals again, contending that the judge erred in failing to allow him to place on the record the reasons why he should have recused himself pursuant to 28 U.S.C. § 455. He further urges that the judge erred in entering an order of April 18, 1990, following an opinion of April 12, 1990, denying his motion to withdraw his plea of guilty because the plea should have never been accepted in the first instance and because his trial attorney was ineffective.

The background of this matter has been fully set forth in our opinion remanding the case, in an opinion of the district court prior to the first appeal, *United States v. Cannistraro*, 694 F. Supp. 62 (D.N.J. 1988), and in the opinion by the district court on remand. *United States v. Cannistraro*, 734 F. Supp. 1110 (D.N.J. 1990). We have carefully reviewed this matter and will affirm with respect to the motion to withdraw the plea of guilty essentially for the reasons set forth by Judge Lechner in his opinion of April 12, 1990.

We cannot regard the motion that the judge should have recused himself on the remand as substantial. In this regard we are permitting the record to be supplemented with the materials to which reference is made in the government's motion dated July 19, 1990, and filed July 23, 1990. The basis advanced for the recusal is that the judge suffered losses in transactions in low cost stocks and was thus biased against Cannistraro who was involved in the distribution of similar securities. The difficulty with the allegation is that the judge did not buy stock in the companies involved in this case and there is no suggestion that Cannistraro had anything to do with the companies in which the judge did deal. Thus, the judge's impartiality could not reasonably be questioned. *See United States v. Furst*, 886 F.2d 558, 583 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 878 (1990).

Appendix A

The orders of April 18, 1990, and April 23, 1990, will be affirmed.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 90-5344 and 90-5369
United States of America
vs.
Richard Cannistraro
Richard S. Cannistraro, Appellant
(Newark, NJ D.C. Crim. No. 87-00193)

Present: GREENBERG, HUTCHINSON, AND COWEN, Circuit Judges

Motion by appellee to strike pages 998-1000 of appellant's appendix as well as those portions of appellant's brief that discuss the content of these pages at pages 20-22,

Copy of Clerk's order dated July 24, 1990, referring above motion to merits panel, sent for the Court's information,

_____
Deputy Clerk 7-5019

Listed on the Merits for 10-9-90.

_____ ORDER _____

The foregoing Motion is denied.

By the Court,

_____
Circuit Judge

Dated: October 15, 1990

APPENDIX B

APPENDIX B — APRIL 12, 1990 DECISION OF THE DISTRICT COURT DENYING PETITIONER'S MOTION TO WITHDRAW HIS GUILTY PLEA

Richard S. Cannistraro (Cannistraro") has filed this motion pursuant to Fed. R. Crim. P. 32(d) to withdraw his guilty plea to all nine counts of the indictment in *United States v. Cannistraro*, Crim. No. 87-193 (the "First Indictment"[1]). Cannistraro claims he would not have pleaded guilty to the First Indictment but for the ineffective assistance of his former trial counsel. He further claims his testimony at the plea Allocution did not establish an adequate factual basis for acceptance of his guilty plea and his plea was accepted under circumstances which materially deviated from the requirements of Fed. R. Crim P. 11. For the reasons which follow, Cannistraro's motion to withdraw the plea is denied.

Background

The First Indictment, which was filed on 28 May 1987, charged Cannistraro with nine substantive criminal offenses: conspiracy to commit securities fraud (count one), creation and use of false nominee accounts in connection with the purchase and sale of securities (counts two - five) creation and distribution of false and misleading research report in violation of section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934, 18 U.S.C. § 371 (count six). In addition, Cannistraro was charged with interstate transportation of money taken by fraud in violation of 18 U.S.C. § 2314 (count seven), mail fraud in violation of 18 U.S.C. § 1341 (count eight), and obstruction of the grand jury investigation in violation of 18 U.S.C. § 1503 (count nine).

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1. Cannistraro was subsequently indicted, along with Leo Eisenberg and Richard Bertoli in *United States v. Cannistraro*, Crim. No. 89-218 (the "Superseding Indictment").

Appendix B

The First Indictment charged that Cannistraro manipulated the price of securities of Liquidation Control, Inc. ("LCI") and Toxic Waste Containment, Inc. ("TWC"), in concert with Bynum Vickory ("Vickory"), portfolio manager of the Bullock Fund, and William Fritz ("Fritz"), portfolio manager of the M&I Fund (collectively the "Funds").[2] Cannistraro agreed with Vickory and Fritz that they would direct the Funds to purchase large amounts of stock in LCI and TWC. As an inducement for the cooperation of Vickory and Fritz, Cannistraro promised to use his influence with principals of LCI and TWC to have stock issued to Vickory and Fritz.

Cannistraro set up false nominee accounts at Monarch Funding, Inc. ("Monarch") in the names of his father, his aunt and two other people for the purpose of concealing the interests of Vickory and Fritz in LCI and TWC. In addition, Cannistraro was a partial beneficial owner of stock in those companies in the nominee accounts and knew he would personally benefit from the purchase of those companies by the funds. In furtherance of this conspiracy, Cannistraro drafted a false and misleading research report favorably evaluating TWC for Wood Gundy, Inc. ("Wood Gundy"), where he was a securities analyst. Cannistraro also bribed a grand jury witness, Carl Alan Key ("Key"), to lie under oath about Cannistraro's involvement with the nominee stock accounts.

Cannistraro was arrested on 15 May 1987 and released after posting $125,000 in cash and a bond. He retained David W. O'Connor ("O'Connor") and Marvin Gersten ("Gersten") (collectively "trial counsel") to represent him in his defense. Trial counsel entered an appearance at Cannistraro's

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2. Vickory and Fritz were not charged with criminal conduct in the first Indictment or the Superseding Indictment.

arraignment on 12 June 1987, when he pleaded not guilty to all counts of the First Indictment. Also on that date, an order was filed directing for discovery and setting the return date for pretrial motions and the trial date. *See* Order for Discovery and Inspection, filed 12 June 1987. Cannistraro was not detained pending trial. *See* Order Setting Conditions of Release, filed 16 June 1987.

On 18 June 1987, trial counsel filed motions for disclosure of witness lists and discovery pursuant to Fed. R. Evid. 404(b), *Brady v. Maryland*, 373 U.S. 83 (1963) and *Simmons v. United States*, 390 U.S. 377 (1968). *See* Notice of Motion, filed 18 June 1987. Cannistraro subsequently withdrew the motion for disclosure of witness lists. *See* Minutes of Proceedings, filed 20 July 1987. An order was entered on 20 July 1987 denying Cannistraro's motions. The Government represented it would turn over Jenks Act material seven days in advance of trial, turn over Rule 404(b) evidence three days prior to trial, continue meeting its *Brady* and *Simmons* obligations and turn over handwriting exemplars. *See* Order, filed 20 July 1987.

After the pretrial motion practice,[3] on or about 16 September 1987 Cannistraro's trial counsel advised the court of Cannistraro's intention to plead guilty to all nine counts of the First Indictment. Soon thereafter, the Government submitted a letter to the court setting forth the legal and factual basis necessary to establish Cannistraro's guilt on each count of the First Indictment. *See* Letter of Robert P. Warren,

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3. A number of other orders were entered relating to scheduling, administrative and discovery matters. They are not relevant for purposes of this discussion.

A.U.S.A., dated 18 September 1987 ("18 September 1987 Letter").[4]

On 21 September 1987, Cannistraro pleaded guilty to counts one through nine of the First Indictment without the benefit of a plea agreement with the Government. A proceeding was held pursuant to Rule 11 of the Federal Rules of Criminal Procedure (the "Rule 11 proceeding"), at which Cannistraro testified under oath. *See* Transcript of Proceedings, dated 21 September 1987 ("Rule 11 Tr.").

At the Rule 11 proceeding, Cannistraro was questioned extensively by the court and Assistant United States Attorney Robert P. Warren ("Warren") regarding the voluntariness of and factual basis for the entry of the guilty plea. Cannistraro was found to be competent to enter the plea and it was determined his testimony established an adequate factual basis to accept the guilty plea. Rule 11 Tr. at 56-57.

Cannistraro testified under oath at the Rule 11 proceeding that he had reviewed the First Indictment and discussed its contents with his attorney. Cannistraro stated his attorney explained the charges, the elements of each crime and the penalties for each crime listed in counts one through nine of the First Indictment.[5] Id. at 8-9. In addition, Cannistraro testified

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4. The 18 September 1987 Letter is a single spaced, twelve page letter which covers the legal and factual bases for each of the nine counts of the First Indictment.

5. O'Connor made particular mention of the fact that he had discussed the likelihood of conviction with his client: (con't)

5. (continued)

> Can I say for the record that in terms of count seven and eight, I've particularly advised Mr. Cannistraro that -- let me check that.

he was satisfied with the representation of his attorney, *id.* at 9, and no promises, threats or arrangements had been made concerning his plea or possible sentence. *Id.* at 21-22.

Cannistraro stated he knew that by entering the plea of guilty to all counts of the First Indictment he was exposing himself to a maximum term of fifty years in prison. Id. at 20. He also acknowledged he could be fined up to $76,000 as provided by statute or alternately fined up to $250,000 or twice the gain to him or loss to his victims. Id.

Regarding the factual basis for his guilty plea, Cannistraro read the following statement which he prepared in collaboration with trial counsel in advance of the Rule 11 proceeding:

> I am pleading guilty to the counts in this indictment.

> Counts six, seven and eight, that all three of those counts he could have been found guilty on Pinkerton theory, since they were acts as part of the conspiracy. And as you ask him particular questions, it will become clear as to interstate commerce or whatever, he doesn't know. *All he knows is that it was a likely end result of this overall role in the conspiracy itself.*

Rule 11 Tr. at 29 (emphasis added). Under *United States v. Pinkerton*, 328 U.S. 640 (1946), having admitted a role in the conspiracy, Cannistraro could be convicted of the substantive crimes committed by his co-conspirators in furtherance of the objects of the conspiracy. Id. at 646.

The 18 September 1987 Letter also discusses the elements of the crimes charged in each count, the penalties for each crime, including incarceration and fines, the appropriate mandatory assessments and restitution as well as a proposed series of questions for each count to establish the required factual basis for the plea.

Appendix B

As to count number one, I agreed with Bynum Vickory and Bill Fritz that they would commit their respective funds to purchase Liquidation Control and that the M&I Fund and the bullock Funds would likely be purchased [sic] of Toxic Waste, Inc. in the open market

As an inducement for the purchase of Liquidation Control, they or their nominees would each be allocated stock in Toxic Waste on the initial public offer of Toxic Waste.

I aided and abetted them in setting up the nominee accounts at Monarch Funding and helped them get their nominee [sic] allocated shares of Toxic Waste in the initial public offer. I knew that it was likely that the purchase of Liquidation Control by a fund would have the like affect of increasing the value of the shares of Liquidation in the open market and that as a beneficial owner of outstanding shares of Liquidation, that I would likely benefit from the funds purchases of Liquidation.

As to count number two, I assisted in the opening of a nominee account in the name of Mary Godano in which account I had a partial beneficial interest.

I used this account to purchase Liquidation Control Incorporated stock on the initial public offer. I was able to get allocations of the initial offer in Liquidation due to my prominent role in the company and my personal business relationship with the president of Monarch, Leo [Ei]senberg [sic]. Even though I was an insider, I failed to disclose this in the prospectus on Liquidation Control's initial public offer.

Appendix B

As to count number three, with my assistance Edward Cannistraro, my father, set up an account at Monarch in which I had a partial beneficial interest at Monarch. I was instrumental in getting an allocation of Liquidation Control stock at the public offer. I failed to disclose this in the prospectus on Liquidation Control's initial public offer.

As to count number four, I set up a nominee account for myself at Monarch Funding in the name of Donna Lee Clarambeau. In this account, Toxic Waste stock was purchased by me under the initial public offer. Since I had a personal business relationship with the president of Monarch, Leo [Ei]senberg [sic], I was able to obtain an allocation in the initial offer of Toxic Waste. I did not disclose this nominee account to the public and, specifically, I did not disclose the nominee account in my research report.

As to count number five, I set up a nominee account for myself at Monarch Funding in the name of Carl Alan Key. In this account also Toxic Waste stock was purchased by me under the initial public offer. I did not disclose this fact to the public and, specifically, I didn't disclose this nominee account in my research report.

As to count number six, I sent the Wood Gundy research report on Toxic Waste to Ground Floor, hoping it would be used in Ground Floor's publication.

I failed to advise them [sic] that I had not disclosed a certain nominees [sic] of mine purchased stock in Toxic Waste on the initial public offer. Moreover, I did not disclose my

position at Liquidation Control Company, many whom [sic] officers were officers of Toxic Waste, nor did I disclose the arrangement with Bill Fritz and Bynum Vickory.

As to count number seven, I aided and abetted Bynum Vickory in opening up an account at Monarch for his nominee. I was aware of the fact that as part of the conspiracy in count number one, there would never be a transfer of money to the account, Vickory's nominee at the time of a sale by Vickory's nominee of Toxic Waste stock and that this transfer would likely be made using interstate commerce.

As to count number eight, when M&I Bank purchased the stock as part of the conspiracy in count number one, I knew that Continental Transfer Company was the transfer agent for Liquidation Control Incorporated and Toxic Waste and, therefore, there would likely be communication using the mails between Continental Transfer and the M&I Bank.

As to count number nine, I paid Carl Alan Key's legal fees by giving him cash payments so he could pay those fees. This was agreed upon, since I believed it unfair for him to pay such legal fees, since he was my nominee and his fees arose because of that fact.

Although Carl Alan Key told me he received a subpoena and he was going to talk to Government officials, I do not know if, in fact, he actually went before the Grand Jury. Carl Alan Key, a close friend since college and I sat down to discuss the events leading up to his purchase of the Toxic Waste stock. In establishing the scenario, we put my role in the

best possible light which was not accurate, in fact.

Id. at 25-29. Cannistraro testified he had reviewed the statement with his attorney and it was an accurate, true and correct account of his conduct. Id. at 24-25.

Following the reading of Cannistraro's statement, the Assistant United States Attorney further inquired into the factual basis for the guilty plea by questioning Cannistraro regarding his alleged criminal conduct on each element of each count of the First Indictment. Warren read from a list of eighty-nine questions prepared by the Government and contained in the 18 September 1987 Letter.[6] Rule 11 Tr. at 30-35. Cannistraro denied or equivocated in answer to some of the questions posed by the Government. However, his proffer as a whole established an adequate factual basis to accept the plea of guilty to all counts of the First Indictment. Id. at 57.

At the end of the Rule 11 proceeding, Cannistraro was again asked whether he wished to plead guilty; he responded affirmatively.[7] The court set forth its findings on the record:

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6. Defense counsel David W. O'Connor objected at the beginning of the Rule 11 proceeding to certain of the questions involving events not relating to the First Indictment. Rule 11 Tr. at 11. O'Connor agreed to proceed with the Rule 11 proceeding and object where appropriate. Id. Where O'Connor objected, questions were not asked. See id. at 40, 42 and 43.

7. The final questions and answers are recorded as follows: (con't.)

7. continued.

BY THE COURT:

Q All of what you've given me here today is true and accurate?
A Yes.

Appendix B

Now, based upon the testimony that I've heard today, based upon the answers to the questions and the statements that you gave without questions, it's my determination that you were competent to enter the plea; that you were adequately represented by counsel and that you were aware of the charges in the indictment. You understood each of the elements of the charges in the indictment; that there was no plea [agreement], there was no promise, no inducement, no threat in order to have you come here and enter the plea. You did so on your own accord.

That you understand your constitutional rights and you knowingly and voluntarily waived your constitutional rights understanding

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Q And all of these facts that you've given me reflect a willful, knowing and intentional participation on your part as reflected in your testimony?
A Yes, your Honor.

THE COURT: Anything else? (cont'd)
(7 cont'd)
MR. WARREN: No, your Honor.

QNow, in light of all the questions I've asked you, in light of all the questions the Government has asked you, in light of the statements of your attorney, statements of the Government, did you still wish to enter a plea of guilty in this matter?
AYes, your Honor.
QAnd how do you plead, guilty or not guilty?
AI plead guilty.

Rule 11 Tr. at 56.

> the penalties, monetary and imprisonment type penalties which could attach.
>
> You gave an adequate factual basis.
>
> Accordingly, I'll accept the plea and adjudge you guilty of each count of the indictment.

Id. at 56-57.

On 24 September 1987, a detention hearing was held and Cannistraro was allowed to remain free on bail pending sentence, but the amount of his bail was increased by $450,000 to $575,000. Cannistraro posted municipal bonds and certificates of deposit amounting to approximately $450,000 in satisfaction of bail. *United States v. Cannistraro,* 694 F.Supp. 62 (D.N.J. 1988), *aff'd in part and remanded,* 871 F.2d 1210 (3d Cir. 1989).

At a 2 November 1987 sentencing hearing, facing a maximum sentence of fifty years in prison, Cannistraro was sentenced to a total of eight years in prison and five years of probation. In addition, he was fined $330,000 and was ordered to pay $394,947[8] in restitution to his victims. *Cannistraro,* 694 F.Supp. at 67.

Following the sentencing, Cannistraro filed motions for reduction of his sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure and for the return of assets posted as bail. Cannistraro's post-trial motions were denied on 5 April 1988. On motion by the Government, the assets posted

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8. The original sentence fined Cannistraro $394,847 but that figure was amended due to an arithmetic error.

as bail were turned over to the trustee appointed to effect restitution to Cannistraro's victims. Id. at 78.

After the denial of Cannistraro's Rule 35 motion, he retained new counsel, Bruce M. Merrill ("Merrill"), and appealed to the Third Circuit. On 6 April 1989 the Third Circuit affirmed the denial of the return of bail monies and the restitution imposed in conjunction with the sentence. *Cannistraro*, 871 F.2d at 1211, 1214. However, the Circuit vacated the term sentence of imprisonment based on supplements to the record which were not before the court at the time of sentencing. The supplemented record showed that the opinion denying the Rule 35 motion mischaracterized a statistical list of average sentences which was contained in the presentence report. Id. at 1216.

The matter was remanded for a determination of whether the statistics were relied on in sentencing Cannistraro and for resentencing in light of the supplemented record. Significantly, the Third Circuit stated the identical sentence of imprisonment could be reimposed if the list of average sentences was not relied on in formulating the sentence of imprisonment. *Id.* at 1217. At a hearing on 5 May 1989 regarding the Third Circuit's opinion, I stated that I did not rely on the table of average sentences contained in the presentence report in imposing the eight year term of incarceration on Cannistraro. *See* Transcript of Proceedings, 5 May 1989, ("5/5/89 Tr.") at 3.

Approximately two weeks after the Third Circuit remanded the case for resentencing--and one and one-half years after the Rule 11 proceeding and sentencing--Cannistraro filed a motion to withdraw his guilty plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure (the "Rule 32(d) motion"). *See* Notice of Motion, filed 21 April 1989.

Appendix B

For purposes of the Rule 32(d) motion, Cannistraro is represented by Robert B. Kurzweil ("present counsel"), .

In support of the Rule 32(d) motion, Cannistraro filed a nine page affidavit which, in twenty separately numbered paragraphs, presents a panoply of allegations challenging the effective assistance of trial counsel.[9] *See* Affidavit of Richard Cannistraro, filed 3 May 1989 ("Cannistraro Aff."). Cannistraro also contends he pleaded guilty to conduct which was not criminal under federal law. Id.

The Government and Cannistraro submitted briefs with respect to the claim that Cannistraro did not establish an adequate factual basis at the Rule 11 proceeding to accept his guilty plea.[10] Regarding the ineffective assistance of counsel portion of the Cannistraro affidavit, evidentiary hearings were commenced on 24 July 1989.[11] On that date, present counsel called O'Connor and Gersten as witnesses and conducted a detailed direct examination of each witness regarding the claims of ineffective assistance of counsel. following the testimony of

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9. Cannistraro does not challenge the effectiveness of his trial counsel in any way subsequent to the Rule 11 proceeding. See Transcript of Proceedings, dated 28 June 1989, at 9-10. therefore, portions of the Cannistraro affidavit which relate to the conduct of counsel subsequent to the Rule 11 proceeding are not relevant to this motion.

10. See Defendant's Brief in Support of Rule 32(d) Motion to Withdraw Plea, dated 27 April 1989 ("Cannistraro Initial Brief"); Memorandum of Law in Opposition to Defendant's Rule 32(d) Motion, dated 15 May 1989 ("Government Opposition Brief"); Reply Brief to the Government's Memorandum of Law in Opposition to Defendant's Rule 32(d) Motion, dated 11 July 1989 ("Cannistraro Reply Brief").

11. The hearings concerned only Cannistraro's claim that he was denied effective assistance of counsel at the Rule 11 proceeding. Present counsel expressly represented he would not request a hearing regarding the adequate factual basis portion of the Rule 32(d) motion.

these witnesses, present counsel rested on behalf of Cannistraro, who was not called as a witness. Transcript of Proceedings held 24 July 1989 ("7/24/89 Tr.") at 137-38.

Significantly, after having had an opportunity to hear the testimony of O'Connor and Gersten, Cannistraro decided not to testify in support of the serious allegations he made against them in his affidavit. Cannistraro thus did not subject himself to cross-examination regarding those allegations. Instead, he merely offered his affidavit as evidence of his complaints of ineffective assistance of counsel. At the evidentiary hearing, Cannistraro affirmatively acknowledged that he had considered the circumstances and concluded he should not testify. Id. at 137-38. On questioning by the court, Cannistraro stated he understood that negative inferences could be drawn from his failure to testify. *Id.* at 138.

The Government and present counsel were requested to brief the issues of whether the affidavit should be considered in the absence of supporting testimony and whether the Rule 32(d) motion retained any viability. *Id.* at 142, 148. The evidentiary hearing was recessed without date, pending the receipt and consideration of the parties' submissions,[12] and subject to the Government's right to present additional evidence. *Id.* at 149.

After raising the question whether the Rule 32(d) motion retained any validity without Cannistraro's testimony, *id.* at

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12. Cannistraro submitted Defendant's Memorandum of Law Concerning Whether his Affidavit Should be Considered and Whether his Motion to Withdraw his Guilty Pleas is Viable Without his Testimony at the On-Going Evidentiary Hearing, dated 6 August 1989 ("Cannistraro Viability Brief"). In opposition, the Government submitted a letter in lieu of a memorandum of law, date 21 August 1989 ("21 August 1989 Letter").

146, the Government originally did not oppose continuing the Rule 32(d) hearing. *See* 21 August 1989 Letter. Subsequently, the Government represented it would not offer additional evidence and would oppose continuing the Rule 32(d) motion. *See* Letter from Robert B. Kurzweil, Esq., dated 16 October 1989. Present counsel then stated he would review the status of the Rule 32(d) hearing with Cannistraro and would make a motion to reopen his case in chief if additional evidence were sought to be introduced. *Id.*

Present counsel did in fact make a request to reopen the Rule 32(d) hearing. a letter, dated 18 October 1989, from present counsel indicated he intended to present additional affidavits and the live testimony of witnesses, including Gary Wolff, Esq. ("Wolff"), Peter J. Blake, Jr. ("Blake") and Glenn S. Waldron ("Waldron"), on the issue of whether the pretrial investigation of trial counsel had been adequate. *See* Letter, from Robert B. Kurzweil, Esq., dated 18 October 1989 (the "18 October 1989 Letter"). Present counsel included with the 18 October 1989 Letter a notice of motion to reopen the evidentiary hearing and requested at least two weeks to notify potential witnesses. *Id.* The motion to reopen was unopposed and was granted. However, present counsel did not submit a form or order on this point until 8 December 1989; the order was signed on that date.

After a delay due to problems with scheduling the witnesses, the Rule 32(d) hearing was reopened on 1 February 1990. On that date, Wolff and Blake testified and were cross-examined by the Government. Waldron asserted his fifth amendment right not to testify, but a proffer of his testimony was read into the record. *See* Transcript of Proceedings, dated 1 February 1990 ("2/1/90 Tr."), at 85-91.

The evidentiary hearings were continued on 8 February 1990. On that date, the Government called O'Connor for

cross-examination and present counsel conducted redirect examination of O'Connor. The Government offered into evidence fifty exhibits and Cannistraro offered four. Both Cannistraro and the Government rested their cases. Again, Cannistraro did not testify. *See* Transcript of Proceedings, dated 8 February 1990 ("2/8/90 Tr.").

At the conclusion of the 8 February 1990 hearing, the court directed that the Government and present counsel submit proposed findings of fact and conclusions of law regarding the ineffective assistance of counsel claim. These submissions were received in mid-March 1990.[13]

Discussion

As noted previously, Cannistraro's motion to withdraw his guilty plea is based on two alternative grounds. He claims he would not have pleaded guilty to the First Indictment but for the alleged ineffective assistance of trial counsel. In addition, Cannistraro argues his conduct did not violate federal securities law despite his sworn testimony to the contrary at the Rule 11 proceeding.

A. The "Fair and Just" Standard

A defendant who has pleaded guilty to a crime in federal court may not withdraw the plea as a matter of right.

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13. The Government submitted The government's Proposed Findings of Fact and Conclusions of Law in Connection with Defendant's Rule 32(d) Motion, dated 15 March 1990 ("Government Proposed Findings"). Cannistraro submitted Defendant's Proposed Findings of Fact and Conclusions of Law Concerning his Claim of Ineffective Assistance of Trial Defense Counsel, dated 19 March 1990 ("Cannistraro Proposed Findings") and Defendant's Pro Se Memorandum of Law Concerning Asserted Rule 11 violations, dated 19 March 1990 ("Cannistraro Pro Se Brief").

Government of Virgin Islands v. Berry, 631 F.2d 214, 219 (3d Cir. 1980). Permission to withdraw a guilty plea is a "privilege," within the discretion of the district court. *Id.* (citing *United States v. Vallejo*, 476 F.2d 667, 669 (3d Cir. 1975); *United States v. Stayton*, 408 F.2d 559, 561 (3d Cir. 1969)). The court's decision to deny a motion to withdraw a guilty plea may not be overturned on appeal absent an abuse of discretion. *United States v. Huff*, 873 F.2d 709, 712 (3d Cir. 1989) (citing *United States v. Trott*, 779 F.2d 912, 915 (3d Cir. 1985)); *Berry*, 631 F.2d at 219-20.

A defendant moving to withdraw his guilty plea prior to sentencing has the burden of coming forth with a "fair and just reason" why his plea should not stand. Rule 32(d) Fed. R. Crim. Pro.;[14] *Huff*, 873 F.2d at 712; *Trott*, 779 F.2d at 915. Generally, permission to withdraw a plea prior to sentencing "should be granted more liberally than ... after sentencing." *Trott*, 779 F.2d at 915. Once a sentence has been imposed, "a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255." Fed. R. Crim. P. 32(d). Section 2255 provides a means of collateral attack on a sentence. However, a motion under that statute will be granted only if the sentence results in "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent

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14. For offenses committed prior to 1 November 1987, as is the case here, Rule 32(d) provided:

If a motion for withdrawal of a plea of guilty or *nolo contendere* is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

Rule 32(d) was amended in 1987, but the changes were technical. No substantive difference was intended. *See* Fed. R. Crim. Pro. 32(d), Notes of the Advisory Committee on Rules, 1987 Amendment to Rule 32.

with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). *See United States v. Timmreck*, 441 U.S. 780, 783 (1979).

Cannistraro argues, although he was sentenced once already, the instant motion must be considered under the pre-sentencing standard of Rule 32(d) rather than under section 2255 because the eight year sentence of imprisonment was vacated on appeal and remanded for reimposition of sentence. Cannistraro Initial Brief at 3. In support of this argument, Cannistraro relies on the decisions of two courts which applied the pre-sentencing standard after a sentence was vacated on appeal. *See, e.g., United States v. Allen*, 668 F.Supp. 969, 972 (W. D. Pa. 1987) (applying "fair and just" standard after sentence was vacated on appeal), *aff'd mem.*, 845 F.2d 1016 (3d Cir. 1988); *United States v. Messer*, 647 F.Supp. 704, 706 (D. Mont. 1986) ("Because the sentence previously imposed has been vacated, the Court will treat the case procedurally as if sentence had never been imposed, and thus will consider the motion pursuant to Rule 32(d)"). The Government has not taken issue with this argument.

Cannistraro's argument, however, is not entirely persuasive. The circumstances of this case suggest Cannistraro should be held to a higher standard than that provided by rule 32(d). first, the rule clearly states the "fair and just" standard applies in three instances: prior to sentencing, where the sentence was suspended or where disposition was had pursuant to 18 U.S.C. § 4205(c).for 15 Fed. R. Crim. P. 32(d). None of those situations exists in this case. Under Rule 32(d), the standard of section 2255 is to be applied "[a]t any later time." *Id.* Thus, a literal reading of the statute dictates against application of the "fair and just" standard.for 16

Second, this case does not involve a situation in which the sentence was vacated in its entirety on appeal. The Circuit affirmed the restitution ordered in conjunction with the sentence of imprisonment. The imposition of fines was not a subject of the appeal. Thus, only one part of the three part sentence was vacated; the other two portions of the sentence were not affected by the Circuit's decision. Simply put, Cannistraro is not in the same position as he was before imposition of sentence. *Cf. Allen*, 668 F.Supp. at 971 (entire sentence vacated on appeal); *Messer*, 647 F. Supp. at 705-06 (same). Rather, Cannistraro is merely awaiting resentencing on one of the three parts of the original sentence--the term of imprisonment. The decision of the Third Circuit which vacated the sentence of imprisonment specifically provided for imposition of the same sentence on remand. *Cannistraro*, 871 F.2d at 1217.

Finally, resentencing in this case will not involve further substantive fact findings. An additional presentencing report and sentencing hearing will not be necessary. Under the instructions of the Third Circuit, the resentencing of Cannistraro will involve only the factual determination of whether the statistical list of average sentences was relied upon in imposing the original sentence nearly two years ago. *Cannistraro*, 871 F.2d at 1216. As noted previously, this determination has been made and stated on the record. The statistical computation was not relied upon in imposing the eight year term of imprisonment on Cannistraro. 5/5/89 Tr. at 3. Accordingly, there are no further factual determinations to be made prior to resentencing.

In the *Allen* case, the district court accepted a guilty plea and imposed a sentence of imprisonment which was vacated on appeal.for 17 *Allen*, 668 F.Supp. at 971. Immediately after the appellate court vacated the sentence, Allen filed a Rule 32(d) motion to withdraw his guilty plea on the grounds that he

was denied effective assistance of counsel and that the plea was not knowingly and voluntarily entered.

Allen argued his motion should be decided under the less stringent standard of Rule 32(d). The district court declined, however, to decide whether the Rule 32(d) standard was applicable in light of the fact that the sentence was vacated on appeal. Rather, the court simply stated Allen had not presented a fair and just reason to withdraw the plea and denied the motion on that ground. *Id.* at 972. Read in light of this, the *Allen* case is not supportive of Cannistraro's position that the "fair and just" standard of Rule 32(d) is applicable to this case.

Although there are serious doubts as to the applicability of the Rule 32(d) "fair and just" standard to this motion, the analysis will proceed under the Rule 32(d) standard for the sole reason that the Government has not objected to its application. As in *Allen*, "[i]t is unnecessary ... to decide which vehicle [Rule 32(d) or section 2255] is correct, since it is clear that [Cannistraro] fails to meet the more liberal standard for relief...." *Id.*

B. Withdrawal of the Guilty Plea

The Third Circuit considers three factors in evaluating whether to permit a defendant to withdraw a plea prior to sentencing: (1) whether the defendant asserts his innocence, (2) whether withdrawal will prejudice the Government and (3) the strength of the defendant's reasons to withdraw the plea. *Huff*, 873 F.2d at 712; *Trott*, 779 F.2d at 915; *see also Berry*, 631 F.2d at 219-20; *United States v. Crowley*, 529 F.2d 1066, 1071 (3d Cir.), *cert. denied*, 425 U.S. 995 (1976). Because a defendant who has pleaded guilty has agreed to forego ordinary rights of the accused such as the presumption of innocence and trial by jury, for 18 he bears the burden of

establishing the existence of facts to support his motion to withdraw. *Allen*, 668 F.Supp. 975 (citing *Berry*, 631 F.2d at 919-20). In this case, it is clear Cannistraro has not asserted his innocence and has failed to present any "fair and just" reason to withdraw his guilty plea.

1. Assertion of Innocence

The first factor to which a court must look under the Third Circuit's test for Rule 32(d) motions is whether the defendant has asserted his innocence. Mere assertions of innocence unfounded on "specific evidence" do not constitute a fair and just reason to withdraw a guilty plea. *Berry*, 631 F.2d at 220; *Allen*, 668 F.Supp. at 974. An assertion of innocence must be credible to support a Rule 32(d) motion. *Berry*, 631 F.2d at 220 (citing *United States v. Washington*, 341 F.2d 277, 281 (3d Cir.), *cert. denied*, 382 U.S. 850 (1965)). Credible assertions of innocence are of "considerable significance." *Id.* However, "equivocatory" statements made at a Rule 11 proceeding are not sufficient to withdraw a plea if "taken as a whole [the defendant's] responses during the colloquy substantially admitted the degree of guilt to which he pleaded." *Trott*, 779 F.2d at 915.

In this case, Cannistraro has made no credible assertion of innocence. Cannistraro's affidavit, which was the original basis of this motion, never employs the words "innocent" or "not guilty" in relation to his conduct. Instead, Cannistraro's affidavit merely asserts trial counsel did not effectively research the crimes with which Cannistraro was charged:

> 8. Trial counsel advised me to plead guilty to several Counts of the First Indictment, despite *my belief* for 19 that my actions may not have violated the law. In fact, the sentencing memorandum submitted by trial counsel stated

> for several counts that, although a guilty plea was entered, it was possible that no violation of law occurred.
>
> 9. Trial counsel did not thoroughly investigate the factual underpinnings necessary to result in a conviction under each count. My own subsequent research has shown that I pleaded guilty to conduct that was either not criminal under the charges contained in the instant indictment or has never been made criminal by federal statue.

Cannistraro Aff. at ¶¶ 8-9 (emphasis added). Cannistraro nevertheless argues these statements are an assertion of innocence. In support of this argument, he notes that Assistant United States Attorney John Fietkiewicz ("Fietkiewicz") stated at the Rule 32(d) hearing that the Cannistraro affidavit "made a sort of what I would say [is] an implied assertion of innocence." 2/8/90 Tr. at 259.

Cannistraro's argument is implausible. Cannistraro did not submit a credible affidavit to establish his innocence; he failed to testify at any of the evidentiary hearings regarding this motion. Negative inferences may be drawn from Cannistraro's failure to testify in support of his affidavit. *See United States v. Martinez*, 785 F.2d 111, 113 (3d Cir. 1986); *United States v. Crooker*, 729 F.2d 889, 890 (1st Cir. 1984); *Berry*, 631 F.2d at 220; *Washington*, 341 F.2d at 281; *Allen*, 668 F.Supp. at 975-76.

At the first evidentiary hearing held on the Rule 32(d) motion, Cannistraro stated that he understood negative inferences could be drawn from his failure to testify in support of the allegations contained in his affidavit. He further stated that the decision not to testify was made with that concern in

mind. 7/24/89 Tr. at 138. Present counsel has conceded "[t]he fact that the Government cannot cross-examine the defendants' sworn affidavit may diminish his credibility in the court's mind..." Cannistraro Viability Brief at 3. Cannistraro does not contest that the complete absence of any testimony in support of his affidavit may render it incredible. Neither the affidavit nor the evidence presented at the evidentiary hearings on the Rule 32(d) motion shows Cannistraro has made any assertion of innocence in this case.

The delay of one and one-half years between the entry of the plea and the filing of the Rule 32(d) motion to withdraw further suggests Cannistraro does not believe he is innocent, but merely is unhappy with the sentence originally imposed:

> A swift change of heart is itself a strong indication that the pleas was entered in haste and confusion .... By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

United States v. Barker, 514 F.2d 208, 222 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975). The alleged concern that Cannistraro's conduct was not criminal comes relatively recently in this proceeding, which is now nearly three years old. Cannistraro did not state he was innocent at either the Rule 11 proceeding or the detention hearing or the sentencing hearing or the Rule 35 motion or on appeal of the sentence or during the hearings on the Rule 32(d) motion to withdraw his plea. Cannistraro had ample opportunity to assert his innocence at any one of those stages, but he did not.

Significantly, Cannistraro refrains from asserting his innocence even at this stage. As noted, his affidavit never

affirmatively states he did not commit the crimes with which he is charged. there is a substantial difference between the statement "I am innocent" or "I am not guilty" and the equivocal statement that: "Trial counsel advised me to plead guilty to several Counts of the First Indictment, despite my belief that my actions may not have violated the law." Cannistraro Aff. at ¶ 9. Cannistraro was free to state the former, but merely advances the latter. This type of hedging cannot be taken as a credible assertion of innocence, especially in the absence of supporting testimony. Cannistraro merely contends that the plea allocution did not establish an adequate factual basis. That is not an assertion of innocence.

Fietkiewicz's comments did not concede this point. After suggesting that Cannistraro's affidavit may arguably contain an implied assertion of innocence, Fietkiewicz stated that the question of whether Cannistraro pleaded guilty to charges that were not criminal was "another issue" relating to "whether the plea allocution is sufficient."for 20 2/8/90 Tr. at 295. These statements establish that Fietkiewicz, far from interpreting the Cannistraro affidavit as an assertion of innocence, agreed with the distinction drawn above between an assertion of innocence and a legal argument that there was not an adequate factual basis for the guilty plea.

There is nothing to support present counsel's claim that "defendant never admitted, *and affirmatively denies*, that he agreed to defraud anyone in connection with the involved stock transactions and never admitted *and affirmatively denies* that he agreed with anyone to artificially raise the prices of those stocks...." Cannistraro Reply Brief at 3 (emphasis added). The only fact present counsel has been able to muster in support of an assertion of innocence is Cannistraro's sentencing memorandum. In that document, it is stated Cannistraro had "no intent to defraud the Bullock Fund or the M&I Fund." Sentencing Memorandum Submitted on Behalf

of Richard Cannistraro at 6, ¶ 4. The sentencing memorandum also argues Cannistraro's conduct in counts four and five of the first Indictment may not have been criminal. *Id.* at 23, ¶ 8; *Id.* at 25, ¶ 8.

The sentencing memorandum, however, does not assert Cannistraro's innocence as to any count of the First Indictment. in fact, it states "he knows what he did was illegal and wrong." *Id.* at 2. In light of Cannistraro's failure to testify and the absence of any assertion of innocence in his affidavit, the sentencing memorandum does not contain a credible assertion of innocence. Indeed the comment is not an assertion by Cannistraro at all--much more an assertion of innocence.

Cannistraro's testimony at the Rule 11 proceeding was found to provide an adequate factual basis to support the guilty plea. Rule 11 Tr. at 56-57. He repeatedly stated his conduct had been willful and knowing *Id.* at 14-15, 52, 53, 55, 56. This testimony admitted the crimes to which Cannistraro pleaded guilty. He may no now rely on equivocal statements made in the sentencing memorandum as an assertion of innocence. *Trott*, 779 F.2d at 915. Cannistraro had made no credible assertion of his innocence.

2. Prejudice to the Government

There is no burden on the Government to come forth with a showing of prejudice, absent the production by the defendant of a fair and just reason to withdraw his guilty plea. *Berry*, 631 F.Supp. at 221 (citing *United States v. Saft*, 558 F.2d 1073, 1083 (2d Cir. 1977)). Therefore, the absence of a showing of prejudice will have no effect on Cannistraro's Rule 32(d) motion unless it is found he has met his burden. *Martinez*, 785 F.2d at 116.

It is, however, almost three years after Cannistraro's First Indictment. The distance in time from the occurrences of the acts and conduct to which Cannistraro pleaded guilty is great. As noted, Cannistraro never asserted ineffective assistance of counsel or claimed the absence of an adequate factual basis for his plea until after his sentence of imprisonment was vacated on appeal. The clear inference to be drawn is that neither claim has factual support and both are meritless.

3. Reasons to Withdraw his Guilty Plea

Cannistraro has offered three alternative challenges to his guilty plea. He argues that, as to counts one through eight of the First Indictment, his guilty pleas involved conduct which was not criminal under federal law.for 21 He also claims he would not have pleaded guilty but for the ineffective assistance of trial counsel in preparing for trial and in persuading him to enter a plea of guilty. Cannistraro finally argues pro se that his guilty pleas should be set aside because the Rule 11 proceeding materially deviated from the standards applicable to such hearings.

a. Adequate Factual Basis

"An otherwise valid guilty plea may be properly accepted *even if the defendant during the colloquy denies factual guilt,* so long as a factual basis is adequately provided by other sources." *Trott*, 779 F.2d at 914 n.1 (emphasis added) (citing *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970)). Where the evidence of the defendant's guilt "substantially negated his claim of innocence" and provided a basis for the trial judge to conclude the plea was "intelligently entered," the plea should not be questioned. *Alford*, 400 U.S. at 38. Equivocal statements of the defendant at the Rule 11 proceeding are an insufficient basis for withdrawal if the plea

allocution as a whole established an adequate factual basis for the guilty plea. *Trott*, 799 F.2d at 915.

At the Rule 11 proceeding Cannistraro did not deny his guilt or claim the conduct to which he pleaded guilty was not criminal. Moreover, he did not make these claims at any point prior to the remand of this case for resentencing. Cannistraro's post-appeal denial of factual guilt is an insufficient basis for this motion to withdraw his plea. As discussed previously, he has not asserted his innocence in this case. His present position contradicts his position at the Rule 11 proceeding where he admitted under oath his guilt and was found to have provided an adequate factual basis for his plea of guilty.

Cannistraro cannot dispute that his plea was entered voluntarily. Following the questioning at the Rule 11 proceeding, he was asked whether he still wanted to plead guilty and whether he was doing it voluntarily; he responded affirmatively. There was never the suggestion of an inadequate basis for his plea until approximately one and one-half years after his plea of guilty when the Third Circuit vacated the term of incarceration portion of his sentence and indicated the same term of incarceration could be reimposed.

Cannistraro is a highly educated individual, for 22. who demonstrated at the Rule 11 proceeding his ability to understand and admit or deny each element of the crimes to

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22. I say "after what amounts to a loss on appeal" because the Third Circuit has stated: "If the district court determines that it did not rely upon the tabel contained in the presentence report..., the original sentence may, in the district court's discretion, be reinstated." Cannistraro, 871 F. 2d at 1217. As mentioned, I stated at the 5 May 1989 hearing that I did not rely on the table referred to by the Circuit. 5/5/89 Tr. at 3.

which he pleaded. *Trott*, 779 F.2d at 914. On this basis, Cannistraro's assertion that he did not understand the words "knowingly" and "willfully" and would not have pleaded guilty had they been explained is unfounded and preposterous. Cannistraro Reply Brief at 3.

There is no factual basis for the attack on the prior finding at the Rule 11 proceeding. In fact, Cannistraro's testimony at the Rule 11 proceeding, including his sworn statement which is quoted in this opinion, admitted all the elements of each crime with which he was charged. Taken as a whole, Cannistraro's responses to the allocution and his statement read into the transcript provided an adequate factual basis for concluding he knowingly admitted to the guilt to which he pleaded on each count of the First Indictment.

In short, there is no need to rehash the factual basis of Cannistraro's guilty plea merely because he decided, after what amounts to a loss on appeal[23]. , for he did not like the sentence imposed. *Cf. Huff*, 873 F.2d at 712 (appellate court does not question findings of fact made at plea hearing merely because "defendant changed his mind about his plea."); *Trott*, 779 F.2d at 914 (trial court's finding of adequate factual basis upheld despite defendant's equivocal statements).[24]

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23. I say "after what amounts to a loss on appeal" because the Third Circuit has stated: "If the district court determines that it did not rely upon the table contained in the presentence report..., the original sentence may, in the district court's discretion, be reinstated." Cannistraro, 871 F. 2d at 1217. As mentioned, I stated at the 5 May 1989 hearing that I did not rely on the table referred to by the Circuit. 5/5/89 Tr. at 3.

24. Merrill, who was Cannistraro's former counsel on this motion, virtually concedes that the plea allocution established an adequate factual basis and that Cannistraro's arguments are an

Appendix B

Upon a re-examination of Cannistraro's admissions at the Rule 11 proceeding, it is apparent an adequate factual basis existed for the acceptance of his guilty plea. Count one of the First Indictment charged Cannistraro with conspiring to commit securities fraud by artificially raising the prices of the stock in LCI and TWC in violation of section 10(b) 25. and Rule 10b-526. of the Securities and Exchange Act of 1934 (the

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attempt to back off from his prior admissions. The Cannistraro Initial Brief, signed by Merrill states:

> Preliminarily, Defendant notes that a review of the plea transcript, in the first instance, appears not to readily support Defendant's position herein, until it is read in light of the misapprehensions and misconceptions Defendant was operating under when he entered those pleas.

Id. at 4 (emphasis added). To the contrary, Cannistraro's admissions at the plea hearing constitutue an adequate factual basis now as they did at the time the guilty plea was entered.

25. Section 10(b) prohibits the use of any instrumentality of commerce or facility of any national securities exchange in connection with a securities transaction that employs "any manipulative or deceptive device or contrivance." 15 U.S.C. Section 78j(b).

26. Rule 10b-5 makes it unlawful to use an instrumentality of commerce or facility of a national securities exchange in connection with the utilization of any device, scheme or artifice to defraud, the assertion of any untrue statement or omission of material fact and the participation in any act which would operate as a fraud or deceit upon any person in connection with the sale of a security. 17 C.F.R. 240,10b-5(a)-(c).

"1934 Act"). Cannistraro's admissions at the Rule 11 proceeding clearly established the existence of and his participation in such a conspiracy.

The statement read by Cannistraro admitted that his conspired with Vickory and Fritz to have the Funds purchase LCI and TWC. In exchange for their promises, Cannistraro would set up false nominee accounts for the benefit of Vickory and Fritz. Further questioning by the Government revealed Cannistraro aided Fritz in purchasing and selling TWC stock through a nominee account for a profit of $50,000, Rule 11 Tr. at 37-39, persuaded Vickory to have his Fund purchase LCI stock, *id.* at 40, and obtained an allotment of LCI stock for Vickory's nominee. *Id.* at 41. This arrangement, which the Government aptly characterizes as a bribery scheme, worked a fraud on shareholders of the Funds in violation of Rule 10b-5. *United States v. Blitz*, 533 F.2d 1329, 1338 (2d Cir.), *cert. denied*, 429 U.S. 819 (1976); *Index Fund, Inc. v. Hagopian*, 609 F.Supp. 499, 506 (S.D.N.Y. 1985).

In addition, Cannistraro's testimony at the Rule 11 proceeding admitted that as a stock analyst for Wood Gundy he failed to disclose the bribery scheme with Vickory and Fritz and his own use of nominee accounts in connection with TWC. Rule 11 Tr. at 35, 50. As an allegedly disinterested stock analyst, Cannistraro had a duty to disclose his interest in TWC to Wood Gundy investors. *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970); *Hanly v. SEC*, 415 F.2d 589, 597 (2d Cir. 1969); *Moholt v. Dean Witter Reynolds, Inc.*, 478 F.Supp. 451, 453 (D.D.C. 1979). His interest in TWC or participation in the bribery schemes would be material to a potential investor who purchased the stock in reliance on Cannistraro's advice.27. *Caravan Mobile Home*

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27. Cannistraro's reliance on Chiarella v. United States 445 U.S. 222 (1980), and Barnett v. Kirshner, 527 F. 2d 781 (2d Cir.

Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc., 769 F.2d 561, 565 (9th Cir. 1985); *SEC v. Rogers*, 790 F.2d 1450, 1458 (9th Cir. 1986); *Zweig v. Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) *see also TSC Indust., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (material information is anything which would significantly alter reasonable investor's actions). Failure to disclose these facts constituted a violations of section 10(b) and Rule 10b-5.

Cannistraro's involvement with setting up false nominee accounts was the subject of counts two through five of the First Indictment. Specifically, counts two through five involved the use of the names of Mary Godano, Edward Cannistraro, Donna Lee Clarambeau and Key, respectively, to set up nominee accounts at Monarch.

In his statement at the Rule 11 proceeding, Cannistraro unequivocally admitted setting up these accounts. In addition, he admitted that while holding a partial beneficial interest in the Mary Godano and Edward Cannistraro accounts, he effected the trading of LCI stock through those accounts, resulting in a profit of approximately $45,000. Rule 11 Tr. at 41-44. During the allocution by Warren, Cannistraro admitted he had provided Donna Lee Clarambeau with money to set up an account at Monarch and that Cannistraro had profited from trading TWC securities through this account. He also admitted to similar conduct involving the Key account. *Id.* at 44-48. Cannistraro failed to disclose his interests in or control of these

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1975), is misplaced. Those cases involved situations in which the defendant did not have a duty to disclose material information. However, Cannistraro had such a duty and violated it by falling to disclose his interest in TWC and his participation in the bribery scheme.

accounts to the public in violation of section 10b and Rule 10b-5 of the 1934 Act. *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1095-96 (2d Cir. 1972); *SEC v. Scott*, 565 F.Supp. 1513, 1526 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 118 (2d Cir. 1984).

In count six of the First Indictment, Cannistraro was charged with violations of section 10(b) and Rule 10b-5 through the creation of false and misleading TWC research reports through Wood Gundy. Cannistraro admitted he failed to disclose in his reports the use of nominee accounts to conceal his interest in TWC and his bribery scheme with Vickory and Fritz. Rule 11 Tr. at 27-28, 48-50.

Cannistraro's testimony at the Rule 11 proceeding also established his guilt on counts seven and eight of the First Indictment. He admitted that he knew the transfer of any amount of money through interstate commerce by any of his co-conspirators would result in his conviction of interstate transportation of money obtained by fraud in violation of 18 U.S.C. § 2314. Rule 11 Tr. at 28. Cannistraro stated he intended for the bribery scheme to benefit Vickory and intended that fraudulently obtained TWC proceeds would be transferred by Vickory to New Jersey. *Id.* at 52. Cannistraro's participation in this scheme was sufficient to establish his guilt under a *Pinkerton* theory. *See supra* note 5.

Finally as to the mail fraud charge in count eight of the First Indictment, Cannistraro admitted he knew that the Continental Transfer company ("Continental") was the transfer agent for LCI and TWC and that there would be mail communications between Continental and the Marshall & Ilsley Bank ("M&I Bank"). *Id.* at 53. The bribery scheme and the transfer of TWC and LCI securities to the M&I Bank could not have occurred without these communications, as Cannistraro admitted. *Id.* These communications were in furtherance of

the conspiracy to defraud and therefore were in violation of 18 U.S.C. § 1341. *United States v. Goldberg*, 401 F.2d 644, 647 (2d Cir. 1968), *cert. denied*, 393 U.S. 1099 (1969); *United States v. Bloom*, 78 F.R.D. 591, 605-606 (E.D. Pa. 1977); *cf. United States v. Brown*, 583 F.2d 659, 664 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (mail to victim to give appearance of legitimacy of business transaction is in furtherance of conspiracy).

For the foregoing reasons, Cannistraro's testimony at the Rule 11 proceeding established an adequate factual basis to accept his plea of guilty to counts one through eight of the First Indictment. His belated and baseless attempts to deny his sworn testimony at the time of his guilty plea underscores the incredibility of any assertion of innocence Cannistraro claims to have made. therefore, he has not met his burden of establishing that denial of this motion would unfairly or unjustly force him to suffer the consequences of his conduct.

b. Assistance of Counsel

The record is devoid of credible evidence in support of Cannistraro's claim that he was denied effective assistance of counsel at the Rule 11 proceeding. The basis for this motion when it was filed was the affidavit of Cannistraro, which accused trial counsel of serious errors, misrepresentations and omissions while advising Cannistraro to plead guilty to all nine counts of the First Indictment.

Cannistraro was given an opportunity to substantiate these accusations at the Rule 32(d) hearings held on 24 July 1989, 1 February 1990 and 8 February 1990.28. However, he did not

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28. Present counsel indicated he requested the hearing only with regard to the ineffective assistance of counsel claims. Present counsel further represented he did not want a hearing with

testify at those hearings. He expressly acknowledged that his failure to testify could lead to negative inferences regarding the credibility and weight of his affidavit and that his testimony might be indispensable in establishing the validity of his claims. 7/24/89 Tr. at 138. The evidentiary support for Cannistraro's ineffective assistance of counsel claim is limited to his affidavit, the affidavits of O'Connor and Gersten calling Cannistraro's allegations "totally false"29. and the evidence and testimony elicited from the witnesses at the Rule 32(d) hearings.

When a defendant who has pleaded guilty challenges the validity of the plea on a claim of ineffective assistance of counsel, the burden rests with him to prove both elements of the test approved in *Hill v. Lockhart*, 474 U.S. 52 (1985). First, he must show the challenged acts or omissions of counsel demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 57 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Second, he must show counsel's ineffective representation "prejudiced" him; in other words, he must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. *See Diggs v. Owens*, 833 F.2d 439, 444=445 (3d Cir. 1987), *cert. denied*, 485 U.S. 979 (1988); *Dooley v. Petsock*,

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regard to the adeuate factual basis portion of the Rule 32(d) motion. Rule 32(d) Tr., at 143.

29. The O'Connor and Gersten affidavits were appended as Exhibits B and C to the Govenment's Memorandum in Support of Motion to Disqualify Brice M. Merrill, Es., dated 12 May 1989. Apparently, the O' Connor and Gersten Affidavits were not filed in the Office of the Clerk of the Court.

816 F.2d 885, 889 (3d Cir.), *cert. denied*, 484 U.S. 863 (1987); *United States v. Giardino*, 797 F.2d 30,31 (1st Cir. 1986).

A court must be "highly deferential" to counsel's decisions in scrutinizing counsel's performance against the objective standard of reasonableness. *Strickland*, 466 U.S. at 689. There is a "strong presumption" that counsel's performance was reasonable. *Id.* The court must minimize the effects of hindsight and must evaluate the conduct of counsel from the standpoint of the facts at the time. *Id.* As noted in *United States v. Gray*, 878 F.2d 2702 (3d Cir. 1989): "It is... only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." *Id.* at 710.

Before examining the record to determine whether he has adduced evidence to meet his burden under the *Hill* test, it must be noted that Cannistraro's failure to testify in support of the allegations contained in his affidavit renders it incredible. Indeed, Cannistraro's counsel admits "[t]he fact that the Government cannot cross examine the defendant's sworn affidavit may diminish his credibility in the court's mind...." Cannistraro Viability Brief at 3.

Cannistraro's allegations of ineffective assistance of counsel may be addressed under two broad rubrics: the trial strategy of O'Connor and Gersten up to the time Cannistraro pleaded guilty and the advice of trial counsel with regard to the decision to plead guilty itself. In consideration of these areas, the two-part *Hill* test must be observed. The ultimate issue is whether trial counsel's conduct fell below an objective standard of reasonableness and, if so, whether Cannistraro would not have entered his guilty plea but for the ineffective assistance of trial counsel.

Appendix B

i. Trial Strategy

The evidence which is most relevant and which carries the most weight in this determination is, of course the testimony of Gersten and O'Connor which was presented at the evidentiary hearings at the Rule 32(d) motion. Briefly stated, that testimony revealed trial counsel had a well-conceived trial strategy for the defense of this case. O'Connor's testimony indicated his trial strategy was to divert the jury's attention from the allegations in the First Indictment over to the issue of whether TWC was a viable company. O'Connor planned to argue that the First Indictment Mistakenly charged that TWC was not viable and in fact that the company would not have failed but for the lack of available Government funds to clean up toxic waste. 7/24/89 Tr. at 29, 80-81; 2/8/90 Tr. at 176-79.

The trial strategy of O'Connor required that trial counsel locate witnesses who had a role in TWC. 2/8/90 Tr. at 249. However, trial counsel did not want to present the testimony of witnesses who also had a role in LCI because O'Connor feared that the company was never actually viable. *Id.* at 181-82. After discussing the matter with Cannistraro, trial counsel concluded this strategy would be harmed by calling Blake and Waldron, who had both worked for LCI and TWC. *Id.* at 181-82, 249. Instead, trial counsel intended to focus on the testimony of Peter Blake III, Congressman Robert Roe and Cannistraro himself.

Cannistraro nevertheless contends trial counsel did not adequately prepare for trial because they did not hire expert witnesses, did not interview potential Government witnesses and did not review all the documentary evidence. Cannistraro argues the failure to hire an accountant particularly disadvantaged him because the Government's case relied on the records of Monarch, the brokerage firm where Cannistraro opened the nominee accounts to conceal his, Vickory's and

Fritz's interests in LCI and TWC. Cannistraro Proposed Findings at 11-12. Cannistraro argues trial counsel misunderstood the relevance of the documentary evidence to the case. *Id.* at 13.

To the contrary, the testimony at the Rule 32(d) hearings demonstrated Gersten and O'Connor did review documentary evidence prior to trial. As they reviewed the Government's proposed trial exhibits, moreover, they recognized that Cannistraro played an important role in the LCI and TWC conspiracies. Based on their discussions with Cannistraro, trial counsel learned the Government's case was much stronger than originally anticipated.

For example, when O'Connor saw the wire that Wood Gundy sent indicating it would issue a research report on TWC, he realized it contained much of the information that was in the final research report. This substantially undermined the defense that the nominees of Cannistraro had sold their interests in TWC prior to issuance of Cannistraro's report favorably reviewing TWC. O'Connor knew the Wood Gundy wire could be used by the Government to establish the price of TWC rose as a result of the wire itself and that the subsequent report written by Cannistraro was not the only factor involved in the manipulation of TWC stock prices. In addition, O'Connor did not pursue the fact that the First Indictment contained an incorrect date for the issuance of Cannistraro's report because certain of the nominees holding TWC securities sold them following the issuance of the wire. 7/24/89 Tr. at 65; 2/8/90 Tr. at 229-30.

Gersten testified that after reviewing the trading records of Vickory and Fritz it became apparent that the Funds did not usually purchase speculative stocks such as LCI. The records indicated some of the stock sold from Cannistraro nominee accounts ended up in the Funds. 7/24/89 Tr. at 129-130.

Gersten and O'Connor testified that Cannistraro became upset when he learned some of the transfers from the nominees were clearly linked to Fund transactions. *Id.* at 90, 129-30.

In addition, Gersten and O'Connor found it difficult to find witnesses to testify on Cannistraro's behalf. Leo Eisenberg, the president of Monarch, and Richard Bertoli, co-defendants with Cannistraro in a securities case by the Securities Exchange Commission ("SEC") involving TWC and LCI, were unavailable. Peter Blake III, 30. a witness who knew of TWC but not LCI, was also unavailable. *Id.* at 30; 2/8/90 Tr. at 191-92. Cannistraro directed O'Connor to rely on an investigator who had been hired by Bertoli in the SEC action to find witnesses, but Vickory and Key could not be located. 7/24/89 Tr. at 36-37; 2/8/90 Tr. at 230-31. Fritz was located but refused to be interviewed. 7/24/89 Tr. at 32-33, 130; 2/8/90 Tr. at 230. Based on years of experience as a prosecutor and defense attorney as well as suggestions from the United States Attorney's office, O'Connor believed Fritz had made a deal with the United States and would not speak to defense counsel. 7/24/89 Tr. at 33-34.

O'Connor also determined Blake and Waldron should not be called as character witnesses for the defense because they had knowledge about the facts of the case and could be effectively cross-examined by the Government regarding their involvement in the case. 2/8/90 Tr. at 221, 297-98. Blake, who was president of TWC during its initial public offering, testified at the 1 February 1990 hearing. He testified that he believed TWC was a viable company and that, in his opinion,

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30. Peter Blake III is apparently the son of Blake, who was president of TWC and who testified at the Rule 32(d) hearings.

Cannistraro's report of TWC was accurate.31. 2/1/90 Tr. at 124-131. However, O'Connor testified he had discussed the strategy of not calling Blake as a character witness with Cannistraro and he agreed that this was proper. 2/8/90 Tr. at 249.

Waldron asserted his fifth amendment privilege at the 1 February 1990 hearing. His proffer, which was offered by present counsel and made part of the record, indicated he would be a character witness, but was not contacted by trial counsel. 2/1/90 Tr. at 87. However, this was part of the decision by O'Connor not to call character witnesses who had knowledge abut the facts of the First Indictment. O'Connor stated that in his judgment a character witness who takes the fifth is not a strong witness. 2/8/90 Tr. at 224. In addition, O'Connor knew Cannistraro's relatives would be testifying against him. Id. at 223-24. In sum, O'Connor testified there were no character witnesses who would testify on behalf of Cannistraro. 7/24/89 Tr. at 82.

The only material witness who testified at the hearings was Wolff, who testified at the 1 February 1990 hearing on behalf of Cannistraro. Wolff stated he would have been available to provide trial counsel with information regarding TWC and LCI. Wolff was the attorney who wrote and filed the registration statements of the companies and represented TWC in negotiations with Thatcher Engineering, Inc.

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31. Based upon my observations of Blake's demeanor and testimony while on the stand, I find him to be an incredible witness. He admitted conduct involving stock transactions which suggest he would be a poor, if not damaging, character witness at trial. To the extent his testimony was relevant at all to the ineffective assistance of counsel issue in this cae, it was incredible and of no weight.

("Thatcher"), an Indiana company which had devised a unique method of containing toxic waste but lacked government funding.

To establish the viability of TWC, O'Connor's trial strategy was to bring out that TWC and Thatcher signed a contract under which TWC was to find government funding for Thatcher. 2/8/90 Tr. at 263-64. O'Connor testified he spoke to William Barton ("Barton"), the attorney for TWC after the company went public and Barton indicated the existence of the contract was in dispute. *Id.* at 186-87. O'Connor stated this seriously undermined the defense strategy of making TWC appear to be a viable company because the contract with Thatcher was the one fact O'Connor needed to press the argument that TWC was more than merely a shell. *Id.* At the 1 February 1990 hearing, Wolff testified he thought the contract between Thatcher and TWC was valid. 2/1/90 Tr. at 114-115. Cannistraro claims O'Connor failed to contact Wolff and thereby gave up the defense without adequately investigating it.

O'Connor did not merely give up the defense, as Cannistraro claims. Barton made clear to O'Connor that the dispute over the Thatcher contract involved the claim by a third company, J.E. Brenneman Company ("Brenneman"), which had a joint venture with Thatcher and another company. Barton told O'Connor that lawyers for Brenneman and Thatcher did not accept the exclusive arrangement between TWC and Thatcher. 2/8/90 Tr. at 1987-89.

O'Connor reviewed two letters from Thatcher's attorney to Wolff which appeared to indicate the contract with TWC would not be effective until the Brenneman agreement was canceled. *Id.* at 255-56. O'Connor also interviewed an officer of Thatcher who confirmed the existence of the dispute over the TWC contract. *Id.* at 189. Gersten suggested to

Cannistraro that trial counsel attempt to contact Wolff, but Cannistraro rejected that suggestion. *Id.* at 221-22. Based on this investigation, O'Connor determined that the viability of TWC was not a feasible defense.32. Following the meeting with Barton, O'Connor told Cannistraro he had virtually no defense to the First Indictment. *Id.* at 189-90.

The testimony of the witnesses at the Rule 32(d) hearings demonstrates trial counsel attempted to develop a prudent trial strategy and investigated it to the extent possible. Ultimately, trial counsel determined Cannistraro could not realistically expect to rely on the viability of TWC as a defense and advised him of this fact. The contention presented by Cannistraro in support of his claim that trial counsel should have pushed the investigation further is implausible. In fact, the testimony of O'Connor and Gersten establishes Cannistraro advised against further investigation and rejected the suggestion that they contact Wolff. Even if Wolff and Blake had been interviewed by trial counsel, however, I find their testimony to be unsupportive of the viability of TWC. To the extent that these witnesses made any statements to support Cannistraro's claims, I find their testimony to be incredible. In point of fact,

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32. A central issue to the defense was whether Wolff sent a signed or unsigned contract to Thatcher in January 1983. O'Connor testified that after reviewing documents provided by Barton, he concluded Wolff did not send a signed contract to Thatcher until February under a cover letter which indicated the contract was not effective until the arrangement with Brenneman was canceled. 2/8/90 Tr. at 255-56. Based on the exhibits submitted by the Government and my observation of the witnesses who testified, to the extent Wolff's testimony contradicts O'Connor's testimony, I find it to be incredible. Succinctly stated, Wolff is not a believable witness. There is virtually no possibility Wolff could have been of assistance to Cannistraro in defending against the First Indictment.

their demeanor while on the witness stand in this matter leads to the conclusion that they would have seriously damaged Cannistraro at trial. These witnesses are simply not credible and not believable.

Cannistraro also argues the pretrial motion practice of trial counsel was ineffective because they did not file a motion for a bill of particulars and did not move to change venue on count nine of the First Indictment. Cannistraro argues that trial counsel's failure to make a motion for a bill of particulars severely hampered the ability of Cannistraro to prepare his defense. However, O'Connor testified he never moved for a bill of particulars because the names of the most relevant unindicted co-conspirators, Vickory and Fritz, were contained in the First Indictment. 7/24/89 Tr. at 30-31.

In addition, Cannistraro has not demonstrated trial counsel was unaware of the existence of material witnesses or evidence which may have aided Cannistraro in his defense. Indeed, as noted above, trial counsel attempted to contact many witnesses and decided not to contact others after considering the trial strategy. Even assuming this court would have granted a motion for a bill of particulars, 33. there is no evidence that the failure of trial counsel to make such a motion impacted Cannistraro's decision to plead guilty. Cannistraro was and is familiar with all of the people involved in his transactions and was capable of appraising trial counsel of their names. No new names have surfaced nor is there a suggestion such other people are available but were not discovered by trial counsel. Accordingly, the argument is irrelevant to the *Hill* test of ineffective assistance of counsel.

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33. This argument is far from certain. See United States v. Zolp, 659 F. Supp. 692, 706-07 (D.N.J. 1987)

Appendix B

As to the argument that trial counsel's conduct fell below an objective standard of reasonableness because they did not move to dismiss count nine of the First Indictment for lack of proper venue, the testimony of O'Connor established he considered the venue issue through discussions with Bertoli, as directed by Cannistraro, but determined venue in New Jersey was proper. 7/24/89 Tr. at 102-3. Cannistraro argues that at the time of the First Indictment only one case in this Circuit addressed the issue of proper venue and that case held that illegal acts to influence a Grand Jury committed outside a district were not sufficient to establish venue in the district where the Grand Jury was sitting. *United States v. Bachert*, 449 F.Supp. 508 (E.D. Pa. 1978).

It appears there is a split in authority concerning this issue. *See United States v. Reed*, 773 F.2d 477 (2d Cir. 1985) (discussing cases and rejecting *Bachert*). Although the Third Circuit has not considered the issue, the majority of circuits hold that venue is proper in the district where the proceeding sought to be obstructed was pending. *Id.* at 484-85. While an argument could have been made to the contrary, O'Connor did not erroneously determine that venue was proper in this district. Cannistraro cannot demonstrate the venue motion would have produced favorable results.[34]

In fact, O'Connor testified he did not bring a motion to change venue because the first Indictment included allegations that established connections of the other offenses with New

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34. By not bringing the motion to dismiss for improper venue, Cannistraro waived objection to venue in this district. United States v. Turcotte, 515 F. 2d 145 (2d Cir.), cert. denied, 423 U.S. 1032 (1975).

Jersey. 7/24/89 Tr. at 104. Giving deference to trial counsel's judgment at the time the instant offense was pending and minimizing the benefit of hindsight, it is not plausible to conclude that trial counsel's conduct fell below an objective standard of reasonableness merely because they did not recognize that one district court opinion supported a minority view that venue may not have been proper.35. Trial counsel's conduct was not unreasonable.

Trial counsel also acted according to responsible professional standards by withdrawing its request for witness lists and by advising Cannistraro to plead guilty to the First Indictment prior to receiving exculpatory and impeachment evidence from the Government. O'Connor testified that the decision to withdraw the witness list motion was a tactical decision because the court had indicated it was not inclined to grant the motion and O'Connor withdrew the motion in an effort to strengthen his motions for disclosure of 404(b) evidence. 7/24/90 Tr. at 46-47. In addition, he testified that the decision to plead his client prior to reviewing impeachment material was an effort to convince the court at sentencing that Cannistraro was entitled to some leniency for accepting responsibility without being "forced into a corner" to do so. *Id.* at 109. Cannistraro has not demonstrated that these decisions were unreasonable or that his decision to plead would have been different had trial counsel not taken this approach.

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35. In addition, it is noted Cannistraro has not challenged the adequacy of the factual basis for count nine. Thus, even if counsel's conduct was unreasonable, Cannistraro waived objection to venue in New Jersey and pleaded guilty to the conduct here. Cannistraro cannot now argue his guilty plea should be withdrawn on this count of theFirst Indictment.

Appendix B

ii. Decision to Enter the Guilty Plea

Cannistraro also claims that trial counsel's advice to plead guilty to all counts of the First Indictment was erroneous and that he would not have entered the guilty plea but for this erroneous advice. At the outset, it must be noted that a number of serious charges by Cannistraro which are contained in the Cannistraro affidavit are not credited in this discussion. Specifically, I find there is no evidence to support the following claims which are contained in the Cannistraro affidavit: trial counsel did not tell Cannistraro that his probable sentence would be at most a short stay at a camp where he would play tennis and make new friends, trial counsel did not tell Cannistraro that he would receive a shorter sentence than R. Foster Winans and trial counsel did not consume alcoholic beverages and fall asleep at the meeting at which the decision to plead guilty was made. In fact, the testimony of O'Connor established he told Cannistraro that he would probably serve his sentence in a prison camp in California and that O'Connor would argue for a shorter sentence than that given to Winans. 2/8/90 Tr. at 233-35. O'Connor predicted Cannistraro would receive eight years. *Id.* at 232. I find Cannistraro's claims to the contrary to be baseless and incredible.36.

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36. In addition, I find that trial counsel did not advise Cannistraro to please merely because his retained had run out. Cannistraro knew his retainer was only an advance against hourly rates and that a portion of the retainer was to pay for work already conpleted on the SEC matter. Trial counsel notified Cannistraro that his retainer has been exhausted prior to the commencment of the trial date. Trial counsel never demanded a specific amount of money from Cannistraro in order to continue working on the case. I also find that there were no conflicts of interest between in trial counsel's representation of Cannistraro.,

Appendix B

Turning to the other allegations, it also appears that trial counsel's conduct did not violate objective standards of reasonableness. The testimony at the Rule 32(d) hearings established that trial counsel prudently and responsibly considered the benefit of entering a guilty plea and attempted to minimize the sentence Cannistraro ultimately would receive. O'Connor and Gersten at all times behaved in a manner consistent with the best interests of their client.

Prior to Cannistraro's decision to plead guilty, Gersten contacted Warren, the prosecutor, to determine his position on a plea agreement. Warren informed Gersten that if Cannistraro did not cooperate with the Government, he must go to trial or plead to the entire First Indictment. Gersten related this information to Cannistraro and strongly urged him to cooperate. 7/24/89 Tr. at 75, 133. O'Connor believed Cannistraro should have cooperated with the Government and pleaded guilty. *Id.* at 80. O'Connor also believed the Government would not enter into a plea agreement without the cooperation of Cannistraro and would object to the entry of a *nolo contendere* plea. *Id.* at 75-77. Accordingly, O'Connor did not inquire of Warren as to the possibility that the Government would agree to take no position at sentencing and did not believe this court would accept a *nolo contendere* plea over the objections of the Government. *Id.* at 76-77, 112, 283.

O'Connor suggested to Cannistraro that he plead guilty to the entire First Indictment based upon a carefully worded plea allocution which minimized the involvement of Cannistraro in the manipulation of TWC and LCI stock. O'Connor believed he could minimize the impact of Cannistraro's past fraudulent activities at sentencing. 2/8/90 Tr. at 197, 231. However, trial counsel indicated Cannistraro would probably receive a sentence of incarceration based on research of prior securities

sentences of this court and discussions with former United State Attorneys. 7/24/90 Tr. at 78. O'Connor also predicted the court would require Cannistraro to make full restitution. *Id.* at 112.

In point of fact, shortly before sentencing, O'Connor predicted Cannistraro would receive eight years imprisonment. *Id.* at 79, 134; 2/8/90 Tr. at 232. Gersten and O'Connor told Cannistraro that a sentence of eight years would make him eligible for parole in three and one-half years and that parole would depend on the amount of money the court found to be involved in the fraud. 7/24/89 Tr. at 134. O'Connor advised Cannistraro that if he plead guilty, his admissions could be used against him by the SEC and in subsequent civil, criminal or tax matters. *Id.* at 110-12. O'Connor also told Cannistraro that if he did not plead guilty and was convicted after trial, he would face a much longer sentence. 2/8/90 Tr. at 280.

O'Connor took a full week to draft the statement that Cannistraro read at the Rule 11 proceeding. O'Connor believed this statement was effective in minimizing Cannistraro's role in the manipulation of TWC and LCI stock. *Id.* at 208. Cannistraro knew that he should come to the plea hearing with his bags packed, as he could expect Warren to press for immediate incarceration. *Id.* Without a detention hearing, information regarding Cannistraro's past wrongful behavior could be kept from the court, possibly improving Cannistraro's position at the time of sentencing. O'Connor told Cannistraro not to oppose the demand for immediate incarceration, but Cannistraro requested that O'Connor oppose the detention. *Id.*

The foregoing discussion demonstrates that trial counsel's representation of Cannistraro met an objective standard of reasonable conduct and that trial counsel did not make

erroneous or misleading representations to Cannistraro which lead him to plead guilty against his best interests or desires.

The Cannistraro affidavit contributes nothing but baseless allegations in support of the motion to withdraw his guilty plea. Accordingly, the Rule 32(d) motion is denied on the grounds of ineffective assistance of counsel.

3. Deviations from Rule 11

Rule 11 of the Federal Rules of Criminal Procedure establishes the procedures for acceptance of a defendant's guilty plea. The rule requires a trial judge to address the defendant personally, in open court to determine whether the defendant understands, among other things, "the nature of the charge to which the plea is offered...." Fed. R. Crim. P. 11(c)(1). The court must make inquiry into whether the plea is voluntary and whether it is the result of discussions between the defendant or his attorney and the attorney for the Government. *Id.* 11(d).37.

The Third Circuit requires strict compliance with the standards of Rule 11. *United States v. Keller*, 594 F.2d 939, 943 (3d Cir. 1979) (citing *Horsley v. United States*, 583 F.2d 670 (3d Cir. 1978). The Supreme Court has held that noncompliance with the Rule 11 safeguards requires that the

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37. Besides the requirement that a defendant be informed of the nature of the charge, Rule 11 contains other requirements; for example, the court must inform the defendant that he is waiving his rights to a jury trial, to confront witnesses and to the assistance of counsel. Fed. R. Crim. P. 11(c)(3). It is unnecessary to discuss the full requirements of Rule11 because Cannistraro only challenges the requirements noted above.

defendant's guilty plea be set aside and a new hearing be held at which the defendant may plead anew. *McCarthy v. United States*, 394 U.S. 459, 472 (1969). This policy ensures that the defendant receives the benefits of the procedural safeguards contained in Rule 11 and "reduce[s] the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and more difficult to dispose of, when the original record is inadequate." *Id.* However, this requirement is not to be interpreted to "impose an undue rigidity on the Rule 11 hearing and completely distort its purpose." *Keller*, 594 F.2d at 943. *Accord McCarthy*, 392 U.S. at 459 ("matters of reality and not mere ritual should be controlling").

Rule 11 was amended in 1983 to provide: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 11(h). *See United States v. Fulford*, 825 F.2d 3, 7 (3d Cir. 1987). The Advisory Committee explained that this amendment was intended to restrict the holding of the Supreme Court's decision in *McCarthy* from being read to mean the harmless error provision of Rule 52(a) [38] does not apply to Rule 11 proceedings. *See* Notes of the Advisory Committee on Rules, 1983 Amendment to Rule 11. The Advisory Committee stated: "Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal." *Id.* (emphasis in original).

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38. Rule 52(a) provides for the application of the harmless error standard to the provisions of the Federal Rules of Criminal Procedure as a whole; it states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a).

Appendix B

Although Rule 11 unequivocally directs the court to address the defendant personally regarding the nature of the crime prior to acceptance of a plea of guilty, no particular procedure must be followed. *Trott*, 779 F.2d at 914. The trial court may make inquiry of the defendant, defense counsel or the Government regarding the factual basis for the plea. *Id.* (citing Notes of the Advisory Committe on Rules, 1966 Amendment to Rule 11).

Nevertheless as stated by the Advisory Committee:

> [S]ubdivision (h) should *not* be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would *not* be harmless error under subdivision (h) where, for example, as in *McCarthy*, there had been absolutely no inquiry by the judge into the defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed a desire to plead guilty.

Notes of the Advisory Committee on Rules, 1983 Amendment to Rule 11 (emphasis in original). The Advisory Committee continued:

> Likewise, it would *not* be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this "results in the creation of an atmosphere of subtle coercion

> that clearly contravenes the policy behind Rule 11."

Id. (quoting *United States v. Crook* 526 F.2d 708 (5th Cir. 1976).

Relying on *McCarthy* and cases decided prior to the 1983 amendment of Rule 11, Cannistraro argues in his pro se brief that the Rule 11 proceeding materially deviated from the procedures established by Rule 11 and he should be permitted to plead anew. Cannistraro makes three specific allegations in support of his argument: the prosecutor was permitted to ask questions concerning the factual basis for the plea, the First Indictment was not read to Cannistraro at the Rule 11 proceeding and Cannistraro did not receive an adequate explanation of the substantive elements of the crimes with which he was charged.

Horsley v. United States, supra, ("Horsley I") demonstrates that Cannistraro's arguments draw on an unreasonably narrow reading of the requirements of Rule 11. In *Horsley I,* the trial judge asked the defendant at the plea allocution hearing whether he had received a copy of the indictment and reviewed it with his attorney. The defendant stated he had read the indictment and understood the charge against him, which was conspiracy to distribute heroin. *Horsley I,* 583, F.2d at 671.

On a collateral attack to the sentence under 28 U.S.C. § 2255, the Third Circuit held the trial judge had not satisfied the strict requirements of Rule 11. The Third Circuit stated:

> In view of the clear prescription ... that the court *personally* inform the defendant of the nature of the charges and the acts which would render him guilty, we must hold that the district

> court's reliance on the [defendant's] private reading of the indictment and discussions of it with his attorney constitutes error... [P]rior decisions of this court preclude us from permitting the district court to abdicate to the [defendant] and his attorney responsibility for minimal compliance with Rule 11.

Id. at 672. The *Horsley I* court noted that simply reading the indictment to the defendant would have satisfied this requirement. *Id.* The trial judge did not read the indictment or explain the elements of the charge to the defendant. The *Horsley I* court therefore remanded the case to permit the plea to be withdrawn and the defendant plead anew.

Soon after the *Horsley I* decision, the Supreme court decided the case of *United States v. Timmreck*, 441 U.S. 780 (1979), which denied collateral relief where the district court failed to inform the petitioner of a mandatory special parole term prior to acceptance of a guilty plea. The *Timmreck* Court held that such relief required a showing of prejudice to the defendant and stated "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of Rule 11." *Id.* at 784. The Court held a fundamental defect or omission did not occur because the petitioner did not "argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." *Id.*

Subsequent to the *Timmreck* decision (but prior to the amendment of Rule 11), the Third Circuit again had occasion to visit the requirements for a challenge to a district court's compliance with Rule 11 in the context of section 2255. Ironically, the petitioner was the same individual who had been granted collateral relief in *Horsley I*. *See United States v. Horsley*, 599 F.2d 1265 n.5 (3d Cir.), *cert. denied*, 444 U.S.

865 (1979) ("*Horsley II*"). In *Horsley II*, the petitioner sought to have his guilty plea set aside on a separate indictment for a related offense.

Relying on the holding of *Timmreck*, the Third Circuit held Horsley was not entitled to section 2255 relief because he "failed to maintain that he did not understand the nature of the charge to which he pled, or that he would have pled not guilty but for the district court's error...." *Id.* at 1269. The *Horsley* II court rejected the reasoning of *Horsley I* to the extent it held "a defendant automatically suffers prejudice whenever the district court fails to comply with the 'nature of the charge' requirement of Rule 11." *Id.*

Under Rule 11(h), a similar showing of prejudice must be made to entitle a defendant to relief on direct appeal of his sentence, *United States v. De Le Puente*, 755 F.2d 313, 314 (3d Cir.), *cert. denied*, 474 U.S. 1005 (1985), and as in this case, on an appeal from an order denying the defendant's motion to withdraw his plea of guilty. *See United States v. Henry*, 8 F.2d 46, 48 (3d Cir. 1990). Therefore, even if the Rule 11 proceeding did not comply with the formal requirements of Rule 11, Cannistraro is not entitled to withdraw his plea of guilty absent a showing that these alleged defects somehow affected substantial rights. *Id.*

There has been absolutely no showing that Cannistraro would not have decided to plead guilty if the court, rather than the United States Attorney, had posed the questions to establish factual foundation for the guilty plea or if the First Indictment had been read at the Rule 11 proceeding. Cannistraro's attempt to argue a contrary position is unpersuasive.

At the Rule 11 proceeding in this case, Cannistraro was extensively questioned by the court as to the voluntariness of

the plea and his understanding of the charges against him. Rule 11 Tr. at 7-9, 21-24. The First Indictment was not read to Cannistraro at the Rule 11 proceeding; however, he admitted having read the First Indictment and having discussed it with his attorney. *Id.* at 8-9.39. Indeed, it was the basis and the framework for the voluntary statement of Cannistraro which he constructed with trial counsel and read at the Rule 11 proceeding.
Q.

Additionally, Cannistraro was asked whether he had received a copy of the 18 September 1987 Letter, which explained the charges, the elements of each offense and the factual basis which the Government sought to establish for acceptance of the guilty plea. Cannistraro stated he had

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39. This discussion is recorded as follows:

> Q. Now, have you reviewed the indictment, have you read it?
> A. Yes, your Honor.
> Q. Have you discussed the indictment with your attorney?
> A. Yes, your Honor.
> Q. Are you satisfied with the representation of your attorney?
> A. Yes.
> Q. Has he explained to you the elements trhe Government must prove beyond a reasonable doubt?
> A. Yes.
> Q. Has he explained to you the fines and imprisonment for which you may be subjecting yourself if the pleas are accepted?
> A. Yes.
> Q. Has he done that for each count?
> A. Yes.

Id. at 8-9.

received the 18 September 1987 Letter and discussed it with his attorney. *Id.* at 10.40.

After being informed of the penalties associated with each count of the First Indictment, Cannistraro was asked a series of questions relating to the elements of count one. Cannistraro responded "Yes" to each of these questions:

> Q With regard to count one, do you understand that you're being charged with a conspiracy to commit securities fraud?

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40. As previously noted, the 18 September 1987 Letter is a twelve page, single spaced letter which explains in detail, on a count-by-count basis, the elements of and penalities for each crime charged in the First Indictment. See supra note 4. Questioning by the court elicited the following response from Cannistraro:

> Q. Before I go through each of these counts, did you review a copy of a letter dated September 18, 1987, which is addressed to me, which was copied to your attorneys, Mr. o"Connor and Mr. Gersten?
> A. I was able to review it yesterday afternoon.
> Q. Did your discuss it with your attorney?
> A. Yes.
> Q. Did your attorney explain it to you?
> A. Yes, your Honor,.
> Q. Did he explain what the elementsx are as set forth for each count?
> A. Yes.

Id. at 9-10. The court then informed Cannistraro in detail of the penalties associated with each of the counts of the First Indictment. *Id.* at 11- 13. As mentioned, the 18 September 1987 Letter sets forth in detail the elements of each crime and each count of the First Indictment and the penalties associated with them.

Q And you have discussed that with your attorney, correct?

Q He explained to you the elements of conspiracy?

Q The fact that a conspiracy, an agreement was willfully formed and existed at or about the time alleged in the indictment and that you willfully became a member of that agreement or that conspiracy and that you or one of your co-conspirators knowingly committed at least one overt act in furtherance of the conspiracy, and although it's not set forth in this letter, one of those overt acts must have occurred in this district, the District of New Jersey. Do you understand that?

Q You discussed that with your attorney. Has he explained that to you?

Q He explained to you what the substantive crime that you were alleged to have conspired to commit, that there is a violation of section 10(b) of the Securities Act. Do you understand that?

Q Did he go over Rule 10b-5 with you?

Q You read both of those in this letter [the 18 September 1987 Letter] on page two?

Q You talked about those with your attorney?

Q You understand all of that?

Id. at 14-15. Cannistraro was told the elements of a conspiracy and had a full understanding of the nature of the charges against him.

Cannistraro read, understood and reviewed with his attorney the contents of the 18 September 1987 Letter and the First Indictment. The 18 September 1987 Letter contains the text of Rule 10b-5 and section 10(b) of the 1934 Act. It also explains the substantive elements of the offenses under those statutes and the conduct Cannistraro was alleged to have committed in violation of those statutes, as well as the elements of the crimes charged in the other counts of the First Indictment.

Questions regarding counts two through nine of the First Indictment were also directed to Cannistraro. He indicated that he had read the 18 September 1987 Letter with respect to each of those counts, had understood and had discussed the elements and conduct of each of those crimes with his attorney. Cannistraro was frequently asked if he had any questions regarding the elements of those offenses and he responded negatively. *Id.* at 15-20. following this questioning by the court, Cannistraro read his prepared statement in open court. *Id.* at 25-29.

The United States Attorney was then permitted to ask additional questions of Cannistraro regarding the factual basis of the guilty plea. Warren read from the list of eighty-nine questions contained in the 18 September 1987 Letter and prepared at the direction of the court. *Id.* at 29-56. The court explained its reasons for having Warren prepare and read the questions regarding the factual basis as follows:

> THE COURT: The fact of the matter is, I don't know the circumstances of the case as intimately as [the defense attorney] or the

> United States knows them. I have followed this procedure, the procedure being requiring the United States Attorney to prepare a plea letter before a plea is entered. I've required the United States Attorney to list questions. He's doing this at my direction.
>
> MR. O'CONNOR: Fine. I thought that was probably true. I just didn't know.

Id. at 3-4.

The Rule 11 proceeding established that Cannistraro was well informed of the charges against him. As noted previously, Cannistraro is highly educated and capable of understanding the charges against him. He was repeatedly asked at the Rule 11 proceeding whether he had questions regarding the charges against him; he stated he did not. His after-the-fact claim that he did not understand those charges is a transparent attempt to manipulate the system to serve his own ends without regard to the absurdity of his position.

Cannistraro has not come close to establishing a substantial violation of his rights under Rule 11. Indeed, the statement prepared and read by Cannistraro at the Rule 11 proceeding demonstrates he had a full and complete understanding of his conduct and the charges against him. He has never made a credible assertion of his innocence throughout the three year period since he was first indicted. This claim, as the other claims made in support of this motion, is flagrant misuse of the system.

Conclusion

Cannistraro's assertion that he pleaded guilty to conduct that is not criminal is unfounded. In addition, the claims of

ineffective assistance of counsel and violation of Rule 11 have no basis in fact. Therefore, the Rule 32(d) motion of Cannistraro to withdraw his guilty plea is denied. Resentencing for Cannistraro in light of the supplemental record, *see Cannistraro,* 871, F.2d at 1217, is now scheduled for 23 April 1990 at 8:30 o'clock a.m.

The Government is to submit an appropriate form of order.

Dated: 12 April 1990

Supreme Court, U.S.
FILED
APR 24 1991
OFFICE OF THE CLERK

(2)

No. 90-1147

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD CANNISTRARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conduct violated the federal securities laws.

2. Whether petitioner received effective assistance of counsel in entering his plea of guilty.

3. Whether the proceedings at which petitioner's guilty plea was accepted conformed to Fed. R. Crim. P. 11.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals, Pet. App. 1a-3a, is unreported, but the judgment is noted at 919 F.2d 137 (Table). A prior opinion of the court of appeals is reported at 871 F.2d 1210. The opinion of the district court denying petitioner's motion to withdraw his guilty plea, Pet. App. 1b-59b, is reported at 734 F. Supp. 1110. A prior opinion of the district court is reported at 694 F. Supp. 62.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1990. The petition for a writ of certiorari was filed on January 14, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a plea of guilty in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; four counts of deceptively using nominee securities accounts, and one count of creating and distributing a misleading stock research report, in violation of 15 U.S.C. 78j(b); interstate transportation of money taken by fraud, in violation of 18 U.S.C. 2313; mail fraud, in violation of 18 U.S.C. 1341; and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to eight years' imprisonment and five years' probation, fined $330,000, and ordered to pay $394,947 in restitution. On petitioner's first appeal, the court of appeals remanded the case for reconsideration of the prison term imposed. On remand, petitioner moved to withdraw his guilty plea. After a hearing, the district court denied the motion and reimposed the same prison term. On petitioner's second appeal, the court of appeals affirmed. Pet. App. 1a-3a.

1. Petitioner was a securities research analyst with the brokerage firm of Wood Gundy, Inc., and an officer and director of Liquidation Control, Inc. (LCI). In November 1982, LCI made a public offering of securities. Monarch Funding Corporation served as the underwriter for the offering and as a market maker for aftermarket trading. At the time of the offering, petitioner established nominee accounts at Monarch in the names of Mary Godano, his aunt, and Edward Cannistraro, his father. Through those accounts petitioner, who already owned 975,000 shares of LCI stock, purchased 120,000 units (consisting of common stock and warrants) of LCI securities for $30,000. During December 1982 and

January 1983, petitioner sold the LCI securities in the nominee accounts for a profit of at least $90,000. C.A. App. 13, 18, 61, 64, 77-78, 83, 1022, 1033-1034.

In December 1982, petitioner proposed that William Fritz, portfolio manager of a trust fund (the M & I Fund), have the fund purchase large blocks of LCI securities. To induce those purchases, petitioner promised to open a nominee account at Monarch for Fritz and arrange for that account to be allocated shares of LCI and of another company, Toxic Waste Containment (TWC). Petitioner told Fritz that he "could make money" through the arrangement. Petitioner later arranged for the allocation to Fritz's account of 7,000 shares in the LCI offering; those shares were sold in February 1983 for a profit to Fritz of approximately $5,500. In March 1983, petitioner assisted in the purchase and sale for Fritz of TWC securities, for a profit of approximately $50,000. C.A. App. 60, 71-74.

In return, in December 1982 Fritz caused the M & I Fund to purchase 60,000 shares of LCI common stock for a total investment of $75,000. In February 1983, Fritz caused the M & I Fund to purchase an additional 50,000 shares of LCI common stock for approximately $84,000. In July 1983, Fritz sold the fund's 110,000 LCI shares for $35,000, or a loss to the fund of approximately $125,000. C.A. App. 1031.

In January 1983, petitioner entered into a similar agreement with Bynum Vickory, the portfolio manager of a mutual fund (the Bullock Fund). Petitioner established a nominee account at Monarch for Vickory and committed to have Vickory allocated stock in the next initial public offering at Monarch, namely TWC. That month Vickory caused the Bullock Fund to purchase 25,000 shares of LCI for a

total purchase price of approximately $40,000. Those shares were later sold for a loss to the fund of $25,000. Petitioner subsequently arranged for the Vickory nominee account to purchase 4,000 units of TWC securities, which were later sold for a profit to Vickory of approximately $25,000. C.A. App. 75-76, 1032.

In February 1983, TWC made a public offering of securities. At that time, petitioner established nominee accounts for himself at Monarch in the names of Donna Lee Clarambeau and Carl Alan Key. Clarambeau was paid for the use of her name. Through those accounts, petitioner purchased 80,000 units of TWC securities for a total cost of $20,000. On March 9, 1983, petitioner sold the TWC securities in the Key account for a profit of $4,695. On March 10, 1983, petitioner sold the TWC securities in the Clarambeau account for a profit of approximately $50,000. C.A. App. 62, 66, 69, 82, 1040, 1042.

In his capacity as a Wood Gundy analyst, petitioner drafted a research report recommending the purchase of TWC securities, in which he failed to disclose the existence of the nominee accounts or his arrangements with Fritz and Vickory. On March 10, 1983, petitioner caused a wire to be sent to Wood Gundy's offices throughout the world announcing that petitioner would soon be issuing the report. Petitioner caused Wood Gundy to issue the report on March 17, 1983, and again in April and May 1983. Petitioner also sent a copy of the report to Ground Floor Publications, an investment news organization, "hoping it would be used in Ground Floor's publication," and he confirmed false and misleading information in a telephone conversation with a reporter from Ground Floor. As a result, Ground Floor dis-

tributed to its subscribers another favorable report on TWC. C.A. App. 62, 68-69, 83-84, 1045.

As a result of petitioner's activities, petitioner and his co-conspirators netted approximately $250,000 in profits from the sale of LCI and TWC securities.[1] C.A. App. 1028.

2. Petitioner pleaded guilty to all nine counts of the indictment. Before accepting petitioner's plea, the district court conducted a hearing pursuant to Federal Rule of Criminal Procedure 11. In a statement at the time of his guilty plea and in response to questions propounded at that hearing by the court and the prosecutor, petitioner admitted facts establishing that he committed securities fraud by: (1) bribing investment fund managers to have their funds purchase securities in LCI, thereby defrauding the funds and manipulating the price of the stock to petitnoner's personal benefit, *e.g.*, C.A. App. 60-61, 71-76; (2) causing a prospectus to be used in sales of LCI securities that was false or misleading as to petitioner's role in the offering, in that it failed to disclose that he had secretly bought securities in the offering through nominee accounts, *e.g.*, *id.* at 61, and (3) issuing, in his capacity as a securities analyst at Wood Gundy, a research report recommending TWC securities, which report was false or misleading in that it was presented as a disinterested report, when in fact petitioner had significant interests in TWC arising out of his use of nominee accounts in trading in TWC stock, his bribery scheme, and his position at LCI, which was an affiliated company of TWC. See, *e.g.*, *id.* at 62, 83-85.

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[1] The unindicted co-conspirators were the fund managers and the nominees for petitioner and the fund managers.

Specifically, petitioner admitted that he knew that a fund's purchase of LCI stock "would have the likely [e]ffect of increasing the value of the shares of [LCI] in the open market and that as a beneficial owner of outstanding shares of [LCI], that I would likely benefit from the fund's purchases." C.A. App. 61. Petitioner acknowledged that his actions were done knowingly, intentionally, and willfully. *Id.* at 87, 91. Petitioner also admitted that his research report was false and misleading in the following respects: (a) it failed to disclose his use of nominee accounts to purchase TWC stock in the initial public offering, *id.* at 62, 83, 85; (b) it failed to disclose his arrangements with Fritz and Vickory, whereby those individuals were paid off with TWC securities, *id.* at 60, 83, 85; and (c) it failed to disclose his financial relationship to and executive position at LCI, a company that had an interlocking board of directors and common management with TWC, and rented office space in the same building. *Id.* at 62, 84-85. Petitioner admitted that he created the research report with the intent to increase the demand for and price of TWC securities. *Id.* at 84.

The district court determined that petitioner was competent to enter his plea and was aware of and understood the charges in the indictment and the elements of each charge.[2] Finding that petitioner's

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[2] Petitioner testified that he held a bachelor's degree and two graduate degrees. C.A. App. 42. He stated that he had reviewed the indictment and discussed it with his attorney, that his attorney had explained the criminal charges, the elements of each crime and the penalties for each crime, and that he understood the elements of conspiracy and of the substantive crimes that he was alleged to have committed. *Id.* at 43-45, 49-55.

statement and testimony furnished "an adequate factual basis" for his guilty plea, the court accepted the plea and adjudged petitioner guilty on each count of the indictment. C.A. App. 91-92.

3. Petitioner appealed his sentence. The court of appeals affirmed all aspects of the sentence except for the prison term of eight years. *United States* v. *Cannistraro*, 871 F.2d 1210, 1217 (3d Cir. 1989). Expressing concern that the district court might have relied on and misinterpreted data concerning sentences in other fraud cases, the court of appeals remanded the case to the district court for resentencing. *Id.* at 1217-1218.

4. On remand petitioner moved, for the first time, to withdraw his plea pursuant to Federal Rule of Criminal Procedure 32(d). He presented three grounds for withdrawing the plea: first, that he was denied effective assistance of counsel; second, that the court had accepted his plea without an adequate factual basis; and third, that his guilty plea hearing was defective in that the prosecutor, rather than the court, conducted some of the questioning that established the factual basis for the plea. Pet. App. 1b.

After several hearings, the district court found that petitioner had not presented a "fair and just reason" within the meaning of Fed. R. Crim. P. 32(d) for withdrawing his plea, and denied petitioner's motion. The court observed that petitioner had not sought to withdraw his plea until one and a half years after entering it, and then only after "what amounts to a loss on appeal." Pet. App. 28b. The court also took note of petitioner's failure to testify in support of his motion, *id.* at 14b; and it observed that petitioner was not asserting his innocence, but "merely contend[ing] that the plea allocution did

not establish an adequate factual basis" for the plea. *Id.* at 24b. Those circumstances, the court stated, suggest that petitioner "does not believe he is innocent, but merely is unhappy with the sentence originally imposed." *Id.* at 23b.

After re-examining petitioner's admissions at the plea hearing, the court again concluded that an adequate factual basis existed for acceptance of the plea. The court recounted petitioner's admissions as to his quid pro quo arrangement with Vickory and Fritz, and concluded that the arrangement "which the Government aptly characterizes as a bribery scheme, worked a fraud on shareholders of the Funds in violation of Rule 10b-5." Pet. App. 30b. The court noted that petitioner admitted that "as a stock analyst for Wood Gundy, he failed to disclose the bribery scheme * * * and his own use of nominee accounts in connection with TWC." *Ibid.* The court concluded that "[a]s an allegedly disinterested stock analyst, [petitioner] had a duty to disclose his interest in TWC to Wood Gundy investors" and that his admitted failure to do so violated Section 10(b) and Rule 10b-5. Pet. App. 30b-31b. The court also recounted petitioner's admissions with regard to his nominee accounts and concluded that his admitted failure to disclose to the public his interests in or control of these accounts violated Section 10(b) and Rule 10b-5. Pet. App. 31b-32b. Finally, the court noted that petitioner had admitted his failure to disclose material information in his research report concerning TWC, also in violation of Section 10(b) and Rule 10b-5. Pet. App. 32b.[3]

[3] With respect to petitioner's conviction for mail fraud, the court noted that petitioner had admitted knowledge that there would be mail communications between the transfer agent for

Next, the district court held that petitioner received effective assistance of counsel in entering his guilty plea. The court held that petitioner's counsel "had a well-conceived trial strategy for the defense of this case." Pet. App. 36b. The court found that petitioner's trial counsel adequately reviewed the government's documentary evidence prior to trial and that this evidence and counsel's discussions with petitioner convinced counsel that the government's case "was much stronger than originally anticipated." *Id.* at 37b. The court further concluded that trial counsel "found it difficult to find witnesses to testify on [petitioner's] behalf." *Id.* at 38b. Based on its review of the evidence presented at the Rule 32(d) hearings, the court found that "trial counsel attempted to develop a prudent trial strategy and investigated it to the extent possible," but that counsel "[u]ltimately" determined that petitioner did not have a valid defense to the indictment. Pet. App. 41b.

The court also concluded that petitioner was not prejudiced by counsel's failure to move for a bill of particulars, because the indictment listed the names of most of the unindicted co-conspirators and because petitioner himself knew all of the participants in his transactions and could inform trial counsel of their names. Pet. App. 42b.[4] In addition, the court rejected petitioner's argument that his trial counsel should have filed a motion to dismiss Count 9 of the

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LCI and TWC and a bank, and that the bribery scheme and transfer of stock "could not have occurred without these communications, as [petitioner] admitted." Pet. App. 32b.

[4] The court added that it was "far from certain" that a motion for a bill of particulars would have been granted. Pet. App. 42b & n.33.

indictment, which charged obstruction of justice, on the ground that venue was improper in the District of New Jersey. The court pointed out that a majority of the circuits have held that venue is proper in the district where the proceeding sought to be obstructed was pending, and that petitioner could not "demonstrate [that a] venue motion would have produced favorable results." *Id.* at 43b.

Finally, the court rejected petitioner's claim that his guilty plea proceeding did not conform to Federal Rule of Criminal Procedure 11. It found that allowing the prosecutor to question petitioner in order to establish the factual basis for the plea had not prejudiced petitioner. It also found that petitioner "had a full and complete understanding of his conduct and the charges against him." Pet. App. 53b, 58b.[5]

5. The court of appeals, in an unpublished opinion, affirmed the district court's order "essentially for the reasons set forth" in the district court's opinion. Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 6-15) that the district court erred in accepting his guilty plea. He argues that, under *Dirks* v. *SEC*, 463 U.S. 646 (1983), *Chiarella* v. *United States*, 445 U.S. 222 (1980), and *United States* v. *Carpenter*, 791 F.2d 1024 (2d Cir. 1986), aff'd by an equally divided court, 484 U.S. 19 (1987), he did not have a duty to disclose material information and therefore did not commit fraud by nondisclosure. That contention is without merit. Petitioner's liability under the securities laws did not

[5] The court reimposed the same sentence that it had originally imposed on petitioner, stating that it had not considered the data regarding sentences in other fraud cases. Pet. App. 12b. Petitioner's sentence is not at issue in this Court.

arise from mere silence; rather, it resulted from his affirmative and systematic acts of manipulation and misrepresentation, which defrauded investors in the markets for LCI and TWC and in the funds whose managers petitioner bribed. A person who has no disclosure duty, and does not commit fraud by remaining silent, still commits fraud if he engages in affirmatively misleading acts. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240 n.18 (1988).

Dirks, *Chiarella*, and *Carpenter* all address the liability of a purchaser or seller of securities under Rule 10b-5 for remaining silent while in possession of material, non-public information. In *Chiarella* and *Dirks* the Court held that silence constitutes fraud under Rule 10b-5 only when the trader has a duty to speak, but fails to make disclosure. *Dirks*, 463 U.S. at 653-654; *Chiarella*, 445 U.S. at 226-230. While noting that corporate officers, directors, and other insiders owe their shareholders fiduciary duties and must disclose material information when trading in the company's securities, the Court determined in those cases that certain corporate outsiders were not under a fiduciary duty to make disclosure, and therefore had not violated Rule 10b-5 when failing to disclose non-public information in their possession. *Dirks*, 463 U.S. at 653-655, 659; *Chiarella*, 445 U.S. at 227-230.[6] In *Carpenter* the Second Circuit held

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[6] The outsider in *Chiarella* was a financial printer who deduced the names of takeover targets from materials submitted to the print shop, then traded in the securities of those companies without disclosure. The outsider in *Dirks* was a financial analyst who learned from a corporate insider of a fraud in the company, following which the analyst advised his clients to sell the company's stock. Although the Court found that neither of those outsiders had disclosure duties, the Court stated in *Dirks* that corporate outsiders who acquire material

that a person who fraudulently misappropriates information and then uses the non-public information to trade in securities commits securities fraud under Rule 10b-5. 791 F.2d at 1031, 1034.[7]

As this Court has recognized, however, even a person who owes no duty to disclose may still commit fraud. Rule 10b-5 also applies to "affirmative misrepresentations by those under no duty to disclose (but under the ever-present duty not to mislead)." *Basic Inc.* v. *Levinson*, 485 U.S. at 240 n.18. The Rule is violated "whenever assertions are made * * * in a manner reasonably calculated to influence the investing public, * * * if such assertions are false or misleading or so incomplete as to mislead." *Id.* at 235 n.13, quoting *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). The same holds true for affirmative acts of manipulation. See, *e.g.*, *United States* v. *Charnay*, 537 F.2d 341, 349-351 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

Here, petitioner admitted to engaging in affirmatively manipulative and misleading acts and statements, which provided an ample factual basis for his guilt on the securities fraud counts. First, he admitted, as to Count 1, that he bribed fund man-

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non-public information from a corporate insider, in breach of the insider's fiduciary duty, do acquire the insider's duty to make disclosure when trading with the company's shareholders. 463 U.S. at 659-661.

[7] The Second Circuit had so held previously in other cases. See *United States* v. *Newman*, 664 F.2d 12 (1981), aff'd after remand, 722 F.2d (Table), cert. denied, 464 U.S. 863 (1983); *SEC* v. *Materia*, 745 F.2d 197 (1984), cert. denied, 471 U.S. 1053 (1985); accord *SEC* v. *Clark*, 915 F.2d 439 (9th Cir. 1990).

agers into purchasing, on behalf of their funds, securities in a company in which he was a corporate insider, and in which he held a substantial stake, which artificially affected price and demand. As petitioner stated, the creation of a false appearance of demand for LCI stock was designed to benefit himself personally, and it worked a fraud on persons who bought LCI stock as a result. Moreover, as the district court noted, petitioner's bribery scheme "worked a fraud on shareholders of the [f]unds in violation of Rule 10b-5." Pet. App. 30b. Cf. *Index Fund, Inc.* v. *Hagopian*, 609 F. Supp. 499 (S.D.N.Y. 1985).

Similarly, as to Counts 2 and 3, petitioner admitted to fraud by misrepresentation. Petitioner rendered the LCI prospectus misleading when he omitted to state that he had secretly taken an allocation of stock in the initial public offering. He breached his "ever-present" duty not to mislead when he failed to see to it that the prospectus was corrected to reflect his use of nominee accounts to purchase LCI securities. Cf. *SEC* v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972); *SEC* v. *Blinder Robinson & Co.*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,491 (10th Cir. Sept. 19, 1983), cert. denied, 469 U.S. 1108 (1985); *SEC* v. *Scott*, 565 F. Supp. 1513 (S.D.N.Y. 1983), aff'd, 734 F.2d 118 (2d Cir. 1984).[8]

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[8] Petitioner's contention (Pet. 9) that he could not have disclosed his purchases in the prospectus because he bought after the prospectus became effective and was first issued ignores the required use of the prospectus in aftermarket trading, see generally L. Loss, *Fundamentals of Securities Regulation* 116-118 (2d ed. 1988); SEC Rule 174, 17 C.F.R. 230.174, and the need to correct the prospectus to reflect post-effective events that render the prospectus misleading. The contention that "[t]he prospectus did, however, list petitioner

Finally, as to Counts 4 through 6, petitioner admitted that his TWC research report was misleading in that it failed to reveal his use of nominee accounts to trade in TWC securities, his bribery arrangements with Vickory and Fritz, and his financial and executive position at LCI. Without those disclosures, the report was misleading because it purported to be the work of a disinterested securities analyst. In sum, even if petitioner could have remained wholly silent, he chose to speak. By doing so in a misleading fashion, he engaged in fraud.[9]

Petitioner also argues (Pet. 13-14) that his acts and statements were not materially misleading, and thus did not violate Rule 10b-5. Materiality is de-

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as an officer of LCI and set forth a substantial stock position held in his name" (Pet. 7) misses the point. What was of importance was petitioner's undisclosed role in facilitating the public offering through his secret purchases in the offering, thereby making the public demand for the securities seem greater than it actually was.

[9] That is not to say petitioner owed no disclosure duties. As an officer and director of LCI, petitioner was a classic corporate insider who owed a fiduciary duty of disclosure when trading in LCI securities. *Chiarella*, 445 U.S. at 227-230. Petitioner breached that duty when he sold LCI securities from his nominee accounts into the aftermarket while failing to disclose to purchasers that the apparent public demand for LCI securities had in fact been procured in significant part by bribing fund managers, and by a corporate insider's taking an allocation of securities in the offering. Petitioner, as a securities broker, also had disclosure duties as to TWC as a result of his recommendation of that company's securities. See generally L. Loss, *Fundamentals of Securities Regulation* 825-826 (2d ed. 1988) (discussing obligation of broker-dealer recommending securities to disclose any bias of the firm, its partners, officers, and directors, or of any employee assuming responsibility for the recommendation).

termined by whether a reasonable shareholder, given all available information, would consider the misstated or omitted information to be important in making an investment decision. See *Basic Inc.* v. *Levinson*, 485 U.S. at 231-232; *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). Petitioner admitted sufficient facts to establish a basis for finding that his acts and statements were materially misleading. The concealed facts here—that fund managers were being bribed to purchase securities on behalf of their funds; that a corporate insider was secretly purchasing stock in an initial public offering, thus making it appear that there was bona fide public demand for the stock; that a research analyst recommending the purchase of a company's securities was in fact selling large blocks of these securities through nominee accounts; that the recommended securities were held by persons whom the research analyst had bribed with the securities; and that the research analyst was an officer and director of a company affiliated with the company he was recommending—could well have "assumed actual significance in the deliberations" of the reasonable investor. *TSC*, 426 U.S. at 449.

Petitioner also misses the mark in contending (Pet. 14) that he did not admit scienter. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976). During the guilty plea proceeding, petitioner admitted that he acted knowingly and intentionally in inducing purchases by the funds of LCI securities, in issuing a false and misleading research report, and in failing to correct a prospectus to disclose material information. C.A. App. 91. Such admissions establish petitioner's knowing participation in violations of the securities laws.

Petitioner also contends (Pet. 15) that he failed to admit facts sufficient to uphold his mail fraud con-

viction because, based on his admissions, the charged mailing was not in furtherance of the scheme. As petitioner admitted, the bank that purchased LCI stock as part of the conspiracy would likely communicate, by mail, with LCI's transfer agent in order to consummate the bank's securities transaction. Pet. App. 8b. Unlike the credit card invoices that were held not to further the fraud involved in *United States* v. *Maze*, 414 U.S. 395 (1974), the communications with the transfer agent here were integral to an ongoing scheme that vitally depended on the completion of securities transactions. Under *Schmuck* v. *United States*, 489 U.S. 705, 712 (1989), the mailings furthered the scheme because it did not "reach fruition" until the securities transactions were completed.

2. Petitioner next contends (Pet. 16-23) that his trial attorneys rendered ineffective assistance of counsel. Specifically, he argues that his trial attorneys erred in failing to move for a bill of particulars, to make a motion to dismiss the obstruction of justice count for lack of venue, and to conduct an adequate factual investigation prior to advising him to enter a guilty plea. The district court properly rejected this fact-bound claim.

To establish ineffective assistance of counsel in the guilty plea process, a defendant must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that but for counsel's unprofessional errors, he would not have pleaded guilty and would have insisted on going to trial. See *Hill* v. *Lockhart*, 474 U.S. 52, 58-59 (1985). A "strong presumption" exists that counsel's performance was reasonable *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). Even "where there is a bone fide defense, counsel may still advise his client to plead guilty if that ad-

vice falls within the range of reasonable competence under the circumstances." *United States* v. *Cronic*, 466 U.S. 648, 657 n.19 (1984).

None of petitioner's claims meets these standards. As the district court held, a bill of particulars would not have materially aided petitioner's defense, because the indictment listed the names of most of the relevant unindicted co-conspirators and because petitioner could have provided his attorneys with the names of the potential witnesses. The indictment in this case is sufficiently detailed to give petitioner adequate notice of the substance of the charges against him without a bill of particulars. Nor has petitioner identified any specific information that he would have obtained through a bill of particulars. Thus, he was not prejudiced by counsel's failure to move for one.

Petitioner also is incorrect in asserting (Pet. 19-20) that a motion for dismissal of Count 9 charging obstruction of justice "would have been successful." Petitioner argues that the district court would have dismissed that count for lack of venue because the acts allegedly giving rise to the obstruction took place outside of the District of New Jersey. In fact, the district court expressed doubt that it would have granted such a motion. It also correctly found that counsel was not ineffective in failing to file such a motion because the great majority of courts that have considered this issue have held that venue for an obstruction of justice charge is proper in the district where the obstructed proceeding is pending. Pet. App. 43b.

The district court properly rejected petitioner's claim (Pet. 20-22) that his trial counsel did not undertake an adequate investigation. As detailed by the district court, Pet. App. 36b-39b, trial counsel reviewed the documentary evidence and interviewed or

attempted to interview relevant witnesses prior to trial as part of a "well-conceived trial strategy for the defense of this case." *Id.* at 36b. Trial counsel's attention shifted from preparation to consideration of a plea only upon learning from the investigation that the prosecution's "case was much stronger than originally anticipated." *Id.* at 37b. There is also no merit to petitioner's claim that counsel selected an investigator hired by an unindicted co-conspirator. As the district court found, petitioner "directed" counsel to employ this investigator. Pet. App. 38b.

3. Finally, petitioner contends (Pet. 23-24) that his guilty plea colloquy violated this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969), because the district court did not personally question petitioner to establish the factual basis for his guilty plea. The factual basis for petitioner's plea was established first by a statement submitted by petitioner that contained a count-by-count admission that he committed the conduct underlying each offense. See Pet. App. 5b-9b. At petitioner's guilty plea proceeding, petitioner stated that he had reviewed that statement with his attorney and that it was accurate and complete. *Id.* at 9b. In addition, the prosecutor extensively questioned petitioner regarding the conduct underlying the indictment. The district court found that petitioner "denied or equivocated in answer to some of the questions posed by the Government, [but] his proffer as a whole established an adequate factual basis to accept the plea of guilty to all counts." *Ibid.*

Contrary to petitioner's contention, nothing in either this Court's decision in *McCarthy* or in Rule 11 requires the district court to ask all of the questions designed to establish the factual basis for the charges to which a defendant is pleading guilty. Rule 11(f) requires only that the court "satisfy" itself that "there is a factual basis for the plea." See also Rule

11(c)(5) (emphasis added) ("*if* the court intends to question the defendant under oath * * * about the offense to which the defendant has pleaded" it must inform him that his statements may be used against him). The Advisory Committee's 1974 notes to Rule 11 specifically state that the Rule does not require "that any particular type of inquiry be made." Moreover, the courts of appeals have routinely upheld guilty pleas against challenges that they lack a factual basis based only on the defendant's own admissions or proffers by the prosecutor. See, *e.g.*, *United States* v. *Montoya*, 891 F.2d 1273, 1295 (7th Cir. 1989); *Harvey* v. *United States*, 850 F.2d 388, 395 & n.4 (8th Cir. 1988); *United States* v. *Carter*, 815 F.2d 827, 829 (1st Cir. 1987); *United States* v. *Trott*, 779 F.2d 912, 914 (3d Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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